That the rates, fares and charges for intrastate commerce within the State of New York fixed by its laws and constitution as aforesaid for the railroads joined in said order of the Interstate Commerce Commission have not and will not result in undue prejudice or unjust burdens or preference or advantage or discrimination in favor of intrastate commerce and against interstate or foreign commerce or against any person or locality. That of the railroads joined in said order of the Interstate Commerce Commission and actually doing intrastate business within the State of New York, the New York Central Railroad Company over its main line between New York and the Pennsylvania Railroad Company over its main line, the Erie Railroad Company over its main line, the Lehigh Valley Railroad Company over its main line, the Delaware, Lackawanna & Western Railroad Company over its main line, the Delaware & Hudson Company over its main line, The New York, New Haven and Hartford Railroad Company over its main line, the New York, Ontario and Western Railway Company over its main line, the Central New England Railway Company over its main line, the Buffalo, Rochester & Pittsburg Railway Company over its main line do a considerable interstate passenger and milk and cream business in connection with a very important intrastate passenger and milk and cream business both in volume and revenue. That as to the branch lines of the aforesaid railroads and as to all the other railroads named in said order of the Interstate Commerce Commission and actually doing an intrastate business within the State of New York, their interstate

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business for passengers and milk and cream is insignificant as compared with their intrastate business both in volume and revenue. That in the case of the Ulster & Delaware Railroad Company the rates, fares and charges allowed said carriers under the laws and constitution of the State of
87 New York for intrastate business are higher than those allowed by the United States for the same classes of business in interstate commerce. That many of the railroads joined in said order are parallelled by or compete with common carriers operated by electricity or motive power other than steam or compete with such carriers, but which
88 are not joined in said order. As to the exact relations between said interstate and intrastate business your complainants are unable to more exactly allege because the method of bookkeeping and accounting imposed upon such railroads by the Interstate Commerce Commission does not permit a separation of the items in the two classes
89 of business and complainants, therefore, beg to be left to their proof.

22, That Charles D. Newton, a plaintiff personally herein, is a citizen and taxpayer of the State of New York residing in the Village of Geneseo, New York, and is a consumer of milk and cream and is frequently transported as a pas-
90 senger by said railroads operating as common carriers in intrastate commerce within the State of New York and particularly over the Albany-Buffalo lines of The New York Central Railroad Company aforesaid and represents a class of consumers and passengers so numerous as to make it impracticable to bring them all before the Court and is made a party hereto in his personal

capacity for the purpose of determining the rights of all consumers and passengers under the laws, constitution and acts of the Interstate Commerce Commission hereinbefore and hereinafter referred to and who now suffer irreparable damage. 91

23. That Charles D. Newton, plaintiff herein, is also the Attorney General of the State of New York duly qualified and acting as such and has his office as is prescribed by law at the Capitol, in the City of Albany, N. Y., within the Northern District of New York. It is his duty under the laws and constitution of the State of New York to bring all actions in the judicial courts in which the People of the State of New York are interested and particularly to sue the railroads joined in the order of the Interstate Commerce Commission as aforesaid for the breaches as aforesaid of the conditions of their charters and for the violations as aforesaid of the laws and franchises of the State of New York under which they operate in said State. Otherwise he subjects himself as such Attorney General to impeachment, criminal prosecution and a multiplicity of suits for damages and the loss of an office of honor and profit to his irreparable damage. 92 93 94

24. That the report, findings and order marked "paper 5" herein of the Interstate Commerce Commission complained of as aforesaid are illegal, unconstitutional and void and of no effect and should be so declared by this Honorable Court in the following particulars. 95

There were no facts before the Interstate Commerce Commission justifying its report, findings and order and the record wholly lacks any founda-

96 tion for the making of such report, findings and order.

The report, findings and order of the Interstate Commerce Commission were made in defiance and disregard of the procedure and requirements of the statutes of the United States and without the full and fair hearing provided for therein.

97 The report, findings and order of the Interstate Commerce Commission are indefinite, uncertain, ambiguous and discriminate without just grounds as between classes of common carriers.

No statute of the United States authorized the report, findings and order of the Interstate Commerce Commission.

98 The report, findings and order of the Interstate Commerce Commission and the statutes of the United States under which they pretended to act violate the 10th Amendment of the United States Constitution, in that they invade powers reserved to the State of New York to regulate intrastate commerce and to create on proper conditions, con-
99 trol and regulate corporations doing business in the State of New York.

The report, findings and order of the Interstate Commerce Commission and the statutes of the United States, under which they pretended to act violate the 5th Amendment of the United States Constitution by taking property of all the Complainants without due process of law in that they
100 impair the obligation of the contract existing between the State of New York and the New York Central Railroad Company pleaded herein as aforesaid.

The report, findings and order of the Interstate Commerce Commission and the statutes of the United States, under which they pretended to act,

violate Article 1, Section 9, Clause 4 of the United States Constitution, in that they impose a capitation and direct tax without the apportionment required. 101

The report, findings and order of the Interstate Commerce Commission, and the statutes of the United States under which they pretended to act, violate Article 1, Section 8, Clause 3 of the United States Constitution in that they assume to regulate purely intrastate commerce and require that revenue for interstate commerce be collected from intrastate commerce. 102

The report, findings and order of the Interstate Commerce Commission and the statutes of the United States, under which they pretended to act, violate Article 1, Section 5, Clause 9 of the United States Constitution, in that they prefer ports of other states to the ports of the State of New York. 103

25. That the Interstate Commerce Commission threatens now to sue the steam railroads joined in its orders as aforesaid for penalties amounting to millions of dollars if said railroads engaged in intrastate commerce within the State violate said report, findings or order of the Interstate Commerce Commission or any part of them. 104

Wherefore your complainants, the State of New York, on behalf of all its citizens and all the persons residing in the State of New York, and Charles D. Newton as Attorney-General of the State of New York, and Charles D. Newton for himself personally and representing a class as aforesaid, being without an adequate remedy at law, and subject to irreparable damage and a multiplicity of suits pray: 105

106 1. That this Honorable Court may grant an interlocutory injunction during the pendency of this suit against the defendants, the United States and the Interstate Commerce Commission and each of them restraining the enforcement, operation and execution of and setting aside in whole the report, findings and order made and entered
107 by the Interstate Commerce Commission as aforesaid, attached hereto and marked " paper 5 " and restraining said defendants, their officers, employees, agents, and servants and successors in office and each of them from doing anything or beginning any suit, action or prosecution against the railroads joined in said order or the plaintiffs to compel the enforcement, operation and execu-
108 tion of said order or interfering with the enforcement of the laws and constitution of the State of New York. That the District Judge of this Honorable Court upon presentation of this application for an interlocutory injunction shall immediately call to his assistance to hear and determine this application two other judges, of whom at least
109 one shall be a circuit judge; that this Honorable Court by an order to show cause shall give at least five days' notice of the hearing of this application for an interlocutory injunction to the Interstate Commerce Commission and to the Attorney-General of the United States all as by statute made and provided.

110 2. That the report, findings and order of the Interstate Commerce Commission attached hereto and marked " paper 5 " be set aside in whole and declared null and void, unconstitutional and illegal, usurpatory and void.

3. That Section 13, subdivisions 3 and 4 of the

111 Interstate Commerce Act be declared null and void, as unconstitutional and usurpatory.

4. That Section 15-a of the Interstate Commerce Act be declared null and void as unconstitutional and usurpatory.

5. That this Honorable Court shall issue writs of mandamus, certiorari and prohibition as war- 112 ranted by the principles and usages of law to the defendants herein and to whoever else may be necessary or proper parties, ancillary to the jurisdiction hereinbefore and hereinafter invoked.

6. That this Honorable Court shall issue a writ of injunction against the defendants, the United States and the Interstate Commerce Commission and each of them perpetually restraining the en- 113 forcement, operation and execution of and setting aside in while the report, findings and order of the Interstate Commerce Commission attached hereto and marked " paper 5," and restraining said defendants, their officers, agents, employees and servants and successors in office and each of them from doing anything or beginning any suit, action 114 or prosecution against the railroads joined in said order or against the plaintiffs herein to compel the enforcement, operation and execution of said report, findings and order or interfering with the enforcement of the laws and constitution of the State of New York.

Plaintiffs also pray not only for a writ of in- 115 junction conformably to the prayer, but also that a subpoena of the United States of America issue out of any under the seal of the Honorable Court directed to the defendants, the United States and the Interstate Commerce Commission thereby

116 *Complaint*

commanding them and each of them on a certain day therein to be named to be and appear before this Honorable Court then and there to answer, (but not under oath, answer under oath being expressly waived) all and singular in the premises and to perform and abide by such order and di-
117 rection or decree as may be made in the premises and that on the final hearing hereof said writ of injunction may be made perpetual and for such other relief as to the Court may seem meet and the plaintiffs will ever pray.

Subscribed by:
The State of New York,
118 Charles D. Newton,
personally and as Attorney-General of the State of New York.

Edward G. Griffin,
Deputy Attorney General of New York,
Solicitor for the Plaintiffs,
119 Office and Post Office Address,
The Capitol, Albany, N. Y.

STATE OF NEW YORK,
CITY AND COUNTY OF ALBANY, } *ss.:*

Charles D. Newton, being duly sworn on oath,
120 says that he is the Attorney-General of the State of New York, duly qualified and acting as such and that he verifies this bill of complaint upon behalf of the plaintiffs herein, the State of New York, and himself personally and as Attorney-General of the State of New York; that he has read the above and foregoing bill of complaint and knows

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the contents thereof and that the same is true in substance and in fact.

CHARLES D. NEWTON.

Subscribed and Sworn to before me
this 27th day of December, 1920.

(SEAL) WILLIAM M. THOMAS, 122
Notary Public, Albany County.

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PAPER 1

126 STATE OF NEW YORK

PUBLIC SERVICE COMMISSION — SECOND DISTRICT

At a session of the Public Service Commission, Second District, held in the city of Albany on the 19th day of August, 1920.

Present:

127 CHARLES B. HILL,
Chairman.
FRANK IRVINE,
JOHN A. BARHITE,
JOSEPH A. KELLOGG,
GEORGE R. VAN NAMEE,
Commissioners.

128 In the Matter of the Petition or Complaint of THE NEW YORK CENTRAL RAILROAD COMPANY; THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY; THE LEHIGH VALLEY RAILROAD COMPANY; and Other 129 Steam Railroad Companies; in Respect to Proposed Higher Passenger Fares.

Case No. 7704

Upon the facts found and for the reasons stated in the accompanying opinion, it is

ORDERED, That the petition herein be, and the 130 same hereby is denied, save in so far as it relates to freight rates, and as to such freight rates, that it be dismissed because the subject matter has been determined in Case No. 7693.

By the Commission,

[L. S.] FRANCIS E. ROBERTS,
Acting Secretary.

PAPER 2 131

In the Matter of the Petition or Complaint of THE NEW YORK CENTRAL RAILROAD COMPANY; also THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY; the LEHIGH VALLEY RAILROAD COMPANY; and OTHER STEAM RAILROAD COMPANIES, in Respect to Proposed Higher Passenger Fares.	Case No. 7704 132

Appearances:

C. C. Paulding, Grand Central Terminal, New 133
York city, and associated with him the following as a Committee of Counsel: *W. L. Visscher, Clyde Brown, John B. Kerr, Mr. Andrus* of the New York, Ontario and Western Railway Company, *Messrs. Noyes* and *Waldron* of The Delaware and Hudson Company, *Mr. R. W. Barrett* of the Lehigh Valley Railroad Company, and *Mr.* 134
Brownell of the Erie Railroad Company, and *Mr. Cole* of the Boston and Maine Railroad.

BY THE COMMISSION:

The steam railroads subject to the jurisdiction of this Commission ask authority to file tariffs effective on short notice whereby passenger rates will be increased 20 per cent, a surcharge made 135
upon passengers in sleeping and parlor cars amounting to 50 per cent of the charge for space in such cars, and an increase of 20 per cent made in excess baggage rates. The petition is informal and very general in its terms, but at the hearing held in Albany, August 17, 1920, it was stated on

136 *Paper 2*

behalf of the petitioners that the object was to make intrastate rates within the State of New York correspond to the increased rates authorized by the Interstate Commerce Commission in the general rate increase case Ex Parte 74. Concurrently with this application there was made by the
137 same carriers an application to file effective on short notice, increases in freight rates. Such permission was granted in case No. 7693 for reasons stated in a memorandum accompanying the order. The instant case presents entirely different legal questions.

The passenger rates now in effect are those im-
138 posed by the United States Railroad Administration during Federal control and continued in effect with certain qualifications by the Transportation Act of 1920. The basic rate is three cents a mile and the proposed increase for ordinary transportation results in a rate of three and six-tenths cents a mile. The proposed surcharge
139 on passengers in sleeping and parlor cars still further increases the rate for that class of passengers. Section 57 of the Railroad Law provides as follows:

> "Rates of fare. Subject to the provisions of the public service commissions law, every railroad corporation may fix and collect the following rates of fare as compensation to
140 be paid for transporting any passenger and his baggage, not exceeding one hundred and fifty pounds in weight, for each mile or fraction of a mile.
>
> * * * * * * *
>
> "2. If a road not incorporated prior to May fifteenth, eighteen hundred and seventy nine, and not located in the counties of New

York and Kings, or within the limits of any incorporated city, and not more than twenty-five miles in length, five cents; if over twenty-five and not more than forty miles, four cents; and if over forty miles, three cents. 141

* * * * * * *

"5. In all other cases, three cents for every such mile or fraction thereof, with a right to a minimum single fare of not less than five cents." 142

Subdivision 1 not quoted provides for roads propelled by rope or cable. The other portions omitted relate to narrow-gauge roads, those with grades of two hundred feet to the mile and upwards, and roads not exceeding fifteen miles in length and not entering an incorporated city. 143
The section also provides that it shall not be construed to allow any rate of fare for way passengers greater than two cents per mile on The New York Central Railroad Company's tracks wherever it is restricted to that rate of fare, that is to say, between Albany and Buffalo. The general effect of this section is to fix a maximum rate 144
of three cents a mile on all important roads in the State. We therefore deal with the case on this basis. If any roads not subject to the limitation desire to put into effect the proposed rates they may make separate application and show reasons for exceptional treatment. This application is made by the roads as an entirety, and the record affords no basis for a discrimination among them. 145

It was held in *People ex rel. U. & D. R. R. Co. v. Pub. Ser. Commission*, 171 App. Div. 607, affirmed, 218 N. Y. 642, that section 60 of the Railroad Law establishing mileage book rates was

146 amended and revised together with section 57 with reference to each other and to the Public Service Commissions Law, and further that under section 49 of the Public Service Commissions Law the Commission is authorized to permit a rate in excess of that fixed by statute when after an investigation it appears that the statu-
147 tory rate is insufficient; that the limitations of the statute remain on the railroads but not on the power of the Commission. It quite clearly appears that the court was of the opinion that the carrier could not of its own volition file tariffs and put into effect rates in excess of those fixed by
148 statute. and that to effect this purpose it must invoke the power of the Commission under section 49. The relevant portion of section 49 is subdivision 1 and is as follows:

> "Whenever either commission shall be of opinion, after a hearing had upon its own motion or upon a complaint, that the rates, fares or charges demanded, exacted, charged
149 or collected by any common carrier, railroad corporation or street railroad corporation subject to its jurisdiction for the transportation of persons or property within the state, or that the regulations or practices of such common carrier, railroad corporation or street railroad corporation affecting such rates are unjust, unreasonable, unjustly discriminatory or unduly preferential, or in any-
150 wise in violation of any provision of law, or that the maximum rates, fares or charges, chargeable by any such common carrier, railroad or street railroad corporation are insufficient to yield reasonable compensation for the service rendered, and are unjust and unreasonable, the commission shall with due

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regard among other things to a reasonable average return upon the value of the property actually used in the public service, and to the necessity of making reservation out of income for surplus and contingencies, determine the just and reasonable rates, fares and charges to be thereafter observed and in force as the maximum to be charged for the 152
service to be performed, notwithstanding that a higher rate, fare or charge has been heretofore authorized by statute, and shall fix the same by order to be served upon all common carriers, railroad corporations or street railroad corporations by whom such rates, fares and charges are thereafter to be observed."

153

This section as originally enacted did not contain the clause beginning " or the maximum rates, fares or charges, chargeable by any such common carrier, railroad or street railroad corporation are insufficient to yield sufficient compensation," etc. Originally the section referred to excessive, unjust, or unreasonable rates or practices. The 154
provision last quoted permitting the carrier to complain when rates are insufficient was added by amendment by chapter 546 of the Laws of 1911, and is the only provision directly applicable to the case (*People ex rel. U. & D. R. R. Co.* v. *Pub. Ser. Commission, supra*). On the hearing the carriers did not assert that they claim relief because the rates are insufficient under section 49, 155
and they certainly presented no evidence sufficient to warrant the Commission in making a final determination to that effect. All that was asserted was that when the interstate rates go into effect the present intrastate rates will be un-

156 justly discriminatory or unduly preferential as between interstate and intrastate passenger traffic and, therefore, unlawful under subdivision 4 of section 13 of the Interstate Commerce Act as amended by Transportation Act of February 28, 1920. Subdivision 4, section 13, is as follows:

157 "Whenever in any such investigation the Interstate Commerce Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable,
158 or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judg-
159 ment, will remove such advantage, preference, prejudice or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

160 It is not claimed that the present rates are unjustly discriminatory or unduly preferential as between points wholly within the State of New York. The discrimination claimed relates to discrimination between persons or localities in intrastate commerce on the one hand and interstate or

foreign commerce on the other. A discrimination may, however, as well result from interstate rates that are too high or too low as from intrastate rates that are too high or too low, and the proper correction may be in the interstate rates over which this Commission has no control. There is no express authority given to the Commission to grant rates in excess of those authorized by statute except under section 49, which has to do only with rates insufficient in themselves. We should not in the absence of legislative authority arrogate to the Commission power to authorize a rate in excess of the statutory maximum merely to enforce a recent act of Congress which contains within itself a special remedy. 161 162 163

The freight rate case is nothing more than an application for a short notice permission and involves no predetermination of the propriety of the rates. This application while it is in part for a short notice permission, demands as a preliminary an investigation and finding of facts sufficient to authorize and demand that the Commission disregard the statutory limitation, and the applicants present no evidence warranting such a finding. 164

As already stated if there are any carriers not within the three cent limitation and whose cases demand special consideration their claims may be presented. The excess baggage rates as well as rates for milk and cream carried on passenger trains were treated by the Interstate Commerce Commission as a part of the case relating to passenger rates. We should treat them in the same manner and deny the application generally. 165

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PAPER 3

BEFORE THE

INTERSTATE COMMERCE COMMISSION

In the Matter of the Rates of Fare for Passengers Charged and Taken upon the Line of the New York Central Railroad Company in the State of New York and Other States.	Docket No. 11623.

167

168 **SECOND AMENDED AND SUPPLEMENTAL PETITION**

Charles C. Paulding,
Clyde Brown,
Francis I. Gowen,
George F. Brownell,
169 Edward G. Buckland,
R. W. Barrett,
W. S. Jenney,
Walter C. Noyes,
J. F. Keany,
C. L. Andrus,
Counsel.

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Paper 3 171

BEFORE THE

INTERSTATE COMMERCE COMMISSION

In the Matter of the Rates of Fare for Passengers Charged and Taken upon the Line of the New York Central Railroad Company in the State of New York and Other States.	Docket No. 11623. 172

SECOND AMENDED AND SUPPLEMENTAL PETITION

Comes now your petitioner, the New York Central Railroad Company, and by this, its second amended and supplemental petition, respectfully represents on its own behalf and on behalf of the Pennsylvania Railroad Company, the Erie Railroad Company, the Lehigh Valley Railroad Company, the Delaware, Lackawanna and Western Railroad Company, the Delaware and Hudson Company, the New York, Ontario and Western Railway Company, the New York, New Haven and Hartford Railroad Company, the Central New England Railway Company, the Long Island Railroad Company, the Buffalo, Rochester and Pittsburgh Railway Company, and other steam railroad companies, doing business within the State of New York, as follows: 173 174 175

I. That your petitioner and each of the railroad companies above named is a corporation, doing business, both freight and passenger, between points within the State of New York and between points within the State of New York and without the State of New York, and in other states of the

176 United States, and subject in all respects, to the provisions of the Interstate Commerce Act, as amended.

That the New York Central Railroad Company, and each of the other companies above named or referred to, is situated in the eastern group of
177 railroads of the United States, as such group is described in the decision of this honorable Commission in the cause designated on the docket of this Commission, as *Ex Parte* 74 and styled "In the matter of the applications of carriers in official, southern, and western classification territories for authority to increase rates," and that all steam railroads in the State of New York are
178 comprised within said eastern group.

II. That the Public Service Commission of the State of New York is a statutory body created by statute of the State of New York, being chapter 429 of the Laws of 1907, as subsequently re-enacted and amended in the year 1910, constituting
179 chapter 48 of the Consolidated Laws, and as amended from time to time thereafter, and has jurisdiction over, among other matters, steam railroads in the State of New York, including the rates and fares charged and chargeable for the transportation of persons and property upon and over such railroads within said State.

180 That the Railroad Law, so-called, of the State of New York, is a general statute of said State, containing provisions with regard to railroads within the State and that, among other provisions of said statute, is contained the following:

"§ 57. RATES OF FARE. Subject to the provisions of the public service commissions

law, every railroad corporation may fix and collect the following rates of fare as compensation to be paid for transporting any passenger and his baggage, not exceeding one hundred and fifty pounds in weight, for each mile or fraction of a mile: 181

* * * * * * *

"5. In all other cases, three cents for every such mile or fraction thereof, with a right to a minimum single fare of not less than five cents. 182

"This chapter shall not be construed to allow any rate of fare for way passengers greater than two cents per mile to be charged or taken over the track or tracks of the railroad known as the New York Central Railroad Company, and the rate of fare for way passengers over the track or tracks of such company shall continue to be two cents per mile and no more, wherever it is restricted to that rate of fare, nor shall any consolidated railroad corporation charge a higher rate of fare per passenger per mile upon any part or portion of the consolidated line than was allowed by law to be charged by each existing corporation thereon previous to such consolidation." 183 184

and that the said statute contains provisions in section 60 thereof requiring every railroad within the State of New York, the line or lines of which are more than 100 miles in length and which is authorized by law to charge a maximum fare of more than two cents per mile and not more than three cents per mile, and which does charge a maximum fare of more than two cents per mile, to issue mileage books, having either 500 or 1,000 coupons attached thereto, entitling the holder 185

186 *Paper 3*

thereof to travel either 500 or 1,000 miles on the line or lines of such railroad mileage books shall be good until all coupons attached thereto have been used and providing a penalty for the refusal to issue such mileage books.

III. That heretofore, pursuant to an applica-
187 tion duly filed with this Commission by the railroad companies of the United States, wherein this Commission was requested to increase rates, fares and charges so that the railroads might earn the net railway operating income provided by the provisions of the Transportation Act, this Commission held hearings and, on July 31, 1920, pro-
188 mulgated its report and order in said cause, which is referred to in the first paragraph or subdivision hereof, and is entitled "In the matter of the applications of carriers in official, southern and western classification territories for authority to increase rates." The report and accompanying
189 order referred to herein are made part of this petition.

That this Commission, in its decision in ex parte 74, determined the aggregate value of the carriers' property in the eastern group, for the purposes of that proceeding, would be in round numbers $8,800,000,000, and that in making this valuation this Commission did not attempt to sep-
190 arate property devoted to the purposes of interstate transportation from property devoted to intrastate transportation, but that the said figure comprised all the property of the carriers in the said group devoted to the purposes of transportation.

That in the decision in said proceeding certain increases in freight rates and in passenger fares were authorized by this Commission and it was determined by this Commission that the increases allowed would yield no more than was necessary to permit the carriers to earn 6 per cent upon the value of their property held for and used in the service of transportation; that this Commission, in making this decision, made no separation between interstate revenue and intrastate revenue and did not separate the expenses for handling interstate traffic and intrastate traffic, but regarded the business of the carriers as a whole, both interstate and intrastate, both as to freight and passenger.

That in the said cause, ex parte 74, this Commission, among other things, granted an increase in passenger fares as follows:

> "1. All passenger fares and charges may be increased 20 per cent. The term 'passenger fares' may be considered to include standard local or interline fares; excursion, convention, and other fares for special occasions; commutation and other multiple forms of tickets; extra fares on limited trains; club car charges.
>
> "2. Excess baggage rates may be increased 20 per cent, provided that where stated as a percentage of or dependent upon passenger fares the increase in the latter will automatically effect the increase in the excess-baggage charges.
>
> "3. A surcharge upon passengers in sleeping and parlor cars may be made amounting to 50 per cent. of the charge for space in such cars, such charge to be collected in con-

196 nection with the charge for space, and to accrue to the rail carriers.

"4. Milk and cream are usually carried in passenger trains, and the revenue therefrom is not included in freight revenue. Rates on these commodities may be increased 20 per cent."

197 IV. That pursuant to the provisions of General Order No. 28 of the Director-General of Railroads, issued by him on May 25, 1918, the said Director-General established standard passenger rates on the basis of three (3c.) cents per mile throughout the United States, which rate included intrastate rates within the State of New York;
198 that commutation rates were, under said General Order, increased 10 per cent.; that the use of mileage books and all kinds of mileage tickets were abolished by said order; and that all rates of fare so established under the terms of said General Order No. 28 by the Director-General have been in force since June 10, 1918, upon the
199 lines of the railroads of the State of New York for intrastate transportation of passengers, and are now in force for such intrastate transportation, pursuant to tariffs duly filed with this Commission.

V. That following the decision of this Commission in ex parte 74 passenger tariffs in blanket
200 supplement form have been filed with this Commission, making effective August 26, 1920, the passenger increases allowed by the Commission in the decision in said cause, and that such increases apply, under the tariffs filed, to the fares for interstate travel charged and taken upon the

Paper 3

line of each of the railroads above mentioned and 201
referred to, and that after August 26, 1920, the fares so fixed by said blanket supplements will be the lawful rates of fare for interstate travel upon the lines of said railroads; that the percentage of increase authorized by this Commission means, on interstate tickets, that a rate of fare of 3.6 cents per mile so fixed, is the normal one-way 202
rate of fare and that interstate passenger fares and charges, including the charges for the transportation of milk and cream, will be increased over the present fares and charges by the amount authorized by this Commission for interstate transportation.

VI. That following the decision of this Com- 203
mission in the said cause, ex parte 74, the steam railroad companies of the State of New York, including your petitioner, the New York Central Railroad Company, and each of the other railroad companies above named and referred to, made an application to the Public Service Commission of the State of New York for permission to file, 204
effective upon five days' notice, blanket form supplements of tariffs naming passenger fares and charges, commutation and other charges, excess baggage charges and milk and cream rates, within the State of New York, such blanket supplements to name fares and charges for intrastate transportation within said State, equal to the 205
amount named in the tariffs filed with this Commission under the said decision in ex parte 74.

That a hearing was had by said Commission upon said application on the 17th day of August, 1920, and thereafter and upon the 19th day of

206 *Paper 3*

August, 1920, the said Commission rendered its decision, denying said petition in an opinion as follows:

"STATE OF NEW YORK

"PUBLIC SERVICE COMMISSION — SECOND DISTRICT

207

"Decided: August 19, 1920.

"Case No. 7704.

"In the matter of the petition (or complaint, of The New York Central Railroad Company; also The Delaware, Lackawanna and Western Railroad Company; the Lehigh Valley Railroad Company; and other steam railroad companies, in respect to proposed higher passenger fares.

208

"By the Commission:

"The steam railroads subject to the jurisdiction of this Commission ask authority to file tariffs effective on short notice whereby passenger rates will be increased 20% a surcharge made upon passengers in sleeping and parlor cars amounting to 50% of the charge of space in such cars and an increase of 20% made in excess baggage rates. The petition is informal and very general in its terms but at the hearing held in Albany, August 17, 1920, it was stated on behalf of the petitioners that the object was to make intrastate rates within the State of New York correspond to the increased rates interstate authorized by the Interstate Commerce Commission in the general rate increase case Ex parte 74. Concurrently with this application there was made by the same carriers an application to file effective on short notice, increases in freight

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rates. Such permission was granted in Case No. 7693 for reasons stated in a memorandum accompanying the order. The instant case presents entirely different legal questions. 211

"The passenger rates now in effect are those imposed by the United States Railroad Administration during Federal control and 212
continued in effect with certain qualifications by the Transportation Act of 1920. The basic rate is three cents a mile and the proposed increase for ordinary transportation results in a rate of 3.6 cents a mile. The proposed surcharge on passengers in sleeping and parlor cars still further increases the rate for that class of passengers. Section 57 of the 213
Railroad Law provides as follows:

> 'Rates of fare. Subject to the provisions of the public service commissions law, every railroad corporation may fix and collect the following rates of fare as compensation to be paid for transporting any passenger and his baggage, not exceeding one hundred and fifty pounds in 214
> weight, for each mile or fraction of a mile.
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> * * * * * * *
>
> 'Subdivision 2—
>
> 'If a road not incorporated prior to May fifteenth, eighteen hundred and seventy-nine, and not located in the counties of New York and Kings, or within the 215
> limits of any incorporated city, and not more than twenty-five miles in length, five cents; if over twenty-five and not more than forty miles, four cents and if over forty miles, three cents.
>
> * * * * * * *

216 ' Subdivision 5 —

' In all other cases, three cents for every such mile or fraction thereof, with a right to a minimum single fare of not less than five cents.'

" Subdivision 1 not quoted provides for
217 roads propelled by rope or cable. The other portion omitted relate to narrow-gauge roads those with grades of two hundred feet to the mile and upwards, and roads not exceeding fifteen miles in length and not entering an incorporated city. The section also provides that it shall not be construed to allow any rate of fare for way passengers greater than two cents per mile on the New York Central
218 Railroad Company wherever it is restricted to that rate of fare, that is to say between Albany and Buffalo. The general effect of this section is to fix a maximum rate of three cents a mile on all important roads in the State. We therefore deal with the case on this basis. If any roads not subject to the limitation desire to put into effect the pro-
219 posed rates they may make a separate application and show reasons for exceptional treatment. This application is made by the roads on an entirety and the record affords no basis for a discrimination among them.

" It was held in the *People Ex Rel U. & D. R. R. Co. v. Pub. Ser. Commission* 171, App. Div. 607, Affirmed 218, N. Y. 642, that section
220 60 of the Railroad Law establishing mileage-book rates was amended and revised together with section 57 with reference to each other and to the Public Service Commissions Law, and further that under section 49 of the Public Service Commissions Law the Commission is authorized to permit a rate in excess of that fixed by statute when after an investi-

gation it appears that the statutory rate is insufficient; that the limitations of the statute remain on the railroads but not on the power of the Commission. It quite clearly appears that the court was of the opinion that the carrier could not of its own volition file tariffs and put into effect rates in excess of those fixed by statute and that to effect this purpose it must invoke the power of the commission under section 49. The relevant portion of section 49 is subdivision 1 and is as follows:

> 'Whenever either commission shall be of opinion, after a hearing had upon its own motion or upon a complaint, that the rates, fares or charges demanded, exacted, charged or collected by any common carrier, railroad corporation or street railroad corporation, subject to its jurisdiction for the transportation of persons or property within the state, or that the regulations or practices of such common carrier, railroad corporation or street railroad corporation affecting such rates are unjust, unreasonable, unjustly discriminatory or unduly preferential, or in anywise in violation of any provision of law, or that the maximum rates, fares or charges, chargeable by any such common carrier, railroad or street railroad corporation are insufficient to yield reasonable compensation for the service rendered, and are unjust and unreasonable, the commission shall with due regard among other things to a reasonable average return upon the value of the property actually used in the public service and to the necessity of making reservation out of income for surplus and contingencies, determine the just and reasonable rates, fares and charges to be thereafter ob-

served and in force as the maximum to be charged for the service to be performed, notwithstanding that a higher rate, fare or charge has been heretofore authorized by statute, and shall fix the same by order to be served upon all common carriers, railroad corporations or street railroad corporations by whom such rates, fares and charges are thereafter to be observed.'

" This section as originally enacted did not contain the clause beginning " Or the maximum rates, fares or charges chargeable by any such common carrier, railroad or street railroad corporation are insufficient to yield sufficient compensation, etc." Originally the section referred to excessive, unjust or unreasonable rates or practices. The provision last quoted permitting the carrier to complain when rates are insufficient was added by amendment by chapter 546 of the Laws of 1911 and is the only provision directly applicable to the case (*People Ex. Rel U. & D. R. R. Co.* v. *Pub. Ser. Commission, supra.*) On the hearing the carriers did not assert that they claim relief because the rates are insufficient under section 49 and they certainly presented no evidence sufficient to warrant the Commission in making a final determination to that effect. All that was asserted was that when the interstate rates go into effect the present intrastate rates will be unjustly discriminatory or unduly preferential as between interstate and intrastate passenger traffic, and, therefore, unlawful under subdivision 4 of section 13 of the Interstate Commerce Act as amended by the Transportation

Act of February 28, 1920. Subdivision 4, section 13 is as follows: 231

> 'Whenever in any such investigation the Interstate Commerce Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation or practice causes any undue or unreasonable advantage, preference, or 232
> prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or min- 233
> imum, or maximum and minimum, thereafter to be charged, and the classification, regulation or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice or discrimination. Such rates, fares, charges, classifications, regulations and practices shall be 234
> observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the de-
> to the contrary notwithstanding.'
> cision or order of any State authority

"It is not claimed that the present rates are unjustly discriminatory or unduly preferential as between points wholly within the 235
State of New York. The discrimination claimed relates to discrimination between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other. A discrimination may, however, as well result from interstate

236 rates that are too high or too low as from intrastate rates that are too high or too low and the proper correction may be in the interstate rates over which this Commission has no control. There is no express authority given to the Commission to grant rates in excess of those authorized by statute except under section 49, which has to do only with
237 rates insufficient in themselves. We should not in the absence of legislative authority arrogate to the Commission power to authorize a rate in excess of the statutory maximum merely to enforce a recent act of Congress which contains within itself a special remedy.

"The freight rate case is nothing more than an application for a short notice per-
238 mission and involves no pre-determination of the propriety of the rates. This application while it is in part for a short notice permission, demands as a preliminary an investigation and finding of facts sufficient to authorize and demand that the Commission disregard the statutory limitation and the applicants present no evidence warranting such a
239 finding.

"As already stated, if there are any carriers not within the three-cent limitation and whose cases demand special consideration, their claims may be presented. The excess baggage rates for milk and cream carried on passenger trains were treated by the Interstate Commerce Commission as a part of the case relating to passenger rates. We should
240 treat them in the same manner and deny the application generally."

and that the result of such decision is that, after August 26, 1920, the one-way interstate rate of fare for passengers upon the lines of the railroads

of the companies hereinabove named and referred to will be 3.6 cents per mile, and the rate of fare for intrastate passage upon such lines will be three cents per mile; that the fare and charge for commutation and other multiple forms of tickets, for excursion, convention and other fares for special occasions, for extra fares on limited trains, for club car charges, and for excess baggage rates will be, for interstate passage, twenty per cent more than the fares and charges for intrastate passage as to such transportation, and that no sur-charge will be charged or taken for passengers in sleeping and parlor cars in intrastate travel, whereas a surcharge of fifty per cent of the charges for space in such cars will be made to passengers in such cars in interstate travel.

That the difference to the railroads, herein named and referred to, in money, as between the amounts, which would be received by these carriers for the transportation within the State of New York, if the passenger fares and charges, including fares and charges for standard local or interline tickets, for excursion, convention and other fares for special occasions, for commutation and other multiple forms of tickets, for extra fares on limited trains, for club car charges, for excess baggage rates, for surcharge upon passengers in sleeping and parlor cars, and for the transportation of milk and cream authorized by this Commission to be charged and taken in interstate commerce, and which are now being charged and taken, were charged and taken in intrastate commerce within the State of New York, and the amounts which will be received by these carriers

246 *Paper 3*
for such transportation within the State of New York under the fares and charges as they now exist for each and all of the different kinds of transportation enumerated above, and are now being charged and taken, and as they must be charged and taken under the decision of the Pub-
247 lic Service Commission of the State of New York above quoted, is many millions of dollars per year, and that the decision of the said State commission in forcing the railroads herein named and referred to to charge rates of fare within the State of New York for intrastate travel less than the rates authorized by this Commission results and
248 will result in an undue and unreasonable advantage, preference or prejudice between persons and localities in intrastate commerce on the one hand, and interstate commerce on the other, and an undue, unreasonable and unjust discrimination against interstate commerce in that, among other things, unless the railroads named and referred
249 to herein are permitted to charge for the transportation of passengers and milk and cream intrastate, within the State of New York, fares and rates prescribed in the said decision and order of this Commission, carriers within the eastern group will earn less than six per cent upon the aggregate value of their property within such group held and used in the service of transporta-
250 tion with the result that the provisions of the Transportation Act would not be carried out.

That the provisions of the Transportation Act contemplated that rates and fares shall be adjusted with reference to the aggregate value of the property of the carriers in the groups de-

termined upon by this Commission and not with reference to the value of the property of any particular carrier in any particular state. That the decision of the Public Service Commission of the State of New York, above quoted, disclaims authority in the Commission to deal with the discrimination against interstate commerce resulting from lower fares in New York and suggests no proper basis for further proceedings before State authorities with reference to the proposed increase in passenger fares

VII. And your petitioner further shows, in its own behalf and in behalf of all the railroad companies named and referred to hereinabove, that the main line of the railroad of the New York Central Railroad Company extends from New York to Buffalo, in the State of New York, and, as to that part of its line, is entirely within the said state; that other railroad lines between New York and Buffalo are the lines of the Lehigh Valley Railroad Company, the Erie Railroad Company, the Delaware, Lackawanna & Western Railroad Company, the New York, Ontario & Western Railway Company, and the line of the West Shore Railroad Company, which is a leased line of the New York Central Railroad Company and is operated by said company; that the line of each of the said last named railroad companies between New York and Buffalo passes through states other than the State of New York, and that the transportation of passengers between such points over each of such named lines is transportation in interstate commerce; that after August 26, 1920, the rate of fare for passengers between

256 New York and Buffalo, upon the line of the New York Central Railroad Company, will be three cents per mile and no more, it being entirely an intrastate journey; that the rate of fare for passengers between said points upon the line of each of the other named railroad companies, including
257 the line of the West Shore Railroad Company operated, as aforesaid, by the New York Central Railroad Company, will be 3.6 cents per mile, such transportation being interstate transportation and that the rate of fare over the line of the New York Central Railroad Company will be $13.16, between said points, as compared with the rate of
258 fare over each of the other lines of $14.36, thus constituting an obviously undue, unreasonable and unjust discrimination against interstate commerce and in favor of intrastate commerce

That after August 26, 1920, the surcharge of fifty per cent of the charge for space in sleeping and parlor cars will be effective upon the lines
259 of the railroads running interstate between New York and Buffalo, and will not be effective upon the line of the New York Central Railroad Company, thus furnishing a further undue, unreasonable and unjust discrimination against interstate commerce.

That such instances of discrimination occur between many other points within the State of New
260 York reached by the West Shore Railroad and by each of the other railroad companies named and by other railroad companies. That a few of such instances are the following: Between New York and Albany are the lines of the New York Central Railroad Company and of the West Shore Rail-

road Company, one at intrastate line and the other an interstate line. That between New York and Utica extend the lines of the New York Central Railroad, an intrastate road, and of the West Shore Railroad and of the New York, Ontario & Western Railway, both interstate roads. Between New York and Syracuse are the lines of the New York Central Railroad, an intrastate line, and the Delaware, Lackawanna & Western Railroad and the West Shore Railroad, interstate lines. That between New York and Rochester extend the lines of the New York Central Railroad, an intrastate line, and the Lehigh Valley Railroad, the Erie Railroad and the West Shore Railroad, interstate lines. That passengers traveling upon the line of the New York Central Railroad between each of such points travel in intrastate commerce; passengers traveling upon each of the other named lines between said points travel in interstate commerce, the rate for intrastate travel being three cents per mile and for the interstate travel 3.6c. per mile. And that your petitioner asks leave to give proof of other instances than those named herein.

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That after August 26, 1920, the rates for the transportation of milk and cream intrastate within the State of New York will be 20 per cent less than the rates for the transportation of milk and cream interstate; that to mention but one instance, large quantities of milk and cream are brought into the City of New York by the New York Central Railroad from points within the State of New York and from points without the State of New York; that the increased rates

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266 charged for the transportation of such milk and cream on points from without the State over the rates charged for the transportation for such commodities from points within the State, constitutes, and will constitute an undue and unreasonable advantage, preference or prejudice as
267 between persons or localities in intrastate commerce on the one hand and interstate commerce on the other hand, and an undue, unreasonable and unjust discrimination against interstate commerce; that milk and cream are transported to the City of New York interstate over the lines of the railroad of the Delaware, Lackawanna & Western
268 Railroad Company, the Lehigh Valley Railroad Company, the Erie Railroad Company, the New York, New Haven and Hartford Railroad Company, and the New York, Ontario & Western Railway Company, many of the points from which such commodities are transported over each of such railroad lines interstate being points compet-
269 itive with points situated upon the line of the New York Central Railroad Company over which the transportation to the City of New York is intrastate, and that the higher rates charged for the transportation of these commodities over these lines interstate as against the charge permitted for the transportation intrastate constitutes an
270 undue and unreasonable advantage, preference or prejudice, as between persons or localities in intrastate commerce on the one hand and interstate commerce on the other hand, and causes an undue, unreasonable and unjust discrimination against interstate commerce.

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That the rates on milk and cream, prior to the decision of this Commission in Ex Parte 74, were those fixed by this Commission in its decision in Case No. 8558, Milk and Cream Rates in New York City, reported in 45 I. C. C., 412, for interstate transportation and applied for intrastate transportation within the State of New York in order to secure a uniformity in rate between interstate and intrastate rates, and as said rate was increased under General Order No. 28 of the Director General.

Wherefore your petitioner prays, on its own behalf and on behalf of the carriers named herein and referred to herein, operating within the State of New York, that this honorable commission, acting under the powers conferred upon it by section 13 of the Interstate Commerce Act as amended, institute an investigation as to the passenger fares and charges for intrastate transportation within the State of New York and as to the charges for the transportation of milk and cream within said state; that it cause the State of New York to be notified of the proceeding and that an order be entered, declaring discriminatory, unjust and unlawful any fares or rates or charges initiated by the President during Federal control or required to be applied by any state authority to the transportation of passengers and of milk and cream within the State of New York, less than those provided in the said order of this Commission in ex parte 74, and prohibiting preferences and discriminations by requiring the establishment of intrastate passenger rates and fares and charges for the transportation of milk and cream

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Paper 3

276 within the State of New York on the same level and basis as those authorized by this Commission in ex parte 74, and prescribing fares and charges or the maximum or minimum, or the maximum and minimum fares and charges thereafter to be charged on intrastate passenger traffic and the intrastate transportation of milk and cream
277 within the State of New York.

Respectfully submitted,

CHARLES C. PAULDING,
CLYDE BROWN,
FRANCIS I. GOWEN,
GEORGE F. BROWNELL,
278 EDWARD G. BUCKLAND,
R. W. BARRETT,
W. S. JENNEY,
WALTER C. NOYES,
J. F. KEANY,
C. L. ANDRUS,
Counsel.

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PAPER 4 281

BEFORE THE

Interstate Commerce Commission

IN THE MATTER of the Rates of Fare for Passengers Charged and Taken upon the Line of the New York Central Railroad Company in the State of New York and Other States.	Docket No. 11623

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New York, N. Y., September 13, 1920.

10 o'clock A. M.

Before:

WILBUR LA ROE, JR., *Chief Examiner.*

Met pursuant to notice.

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Appearances:

Charles C. Paulding, Grand Central Terminal, New York city, appearing for the New York Central Railroad Company; Delaware, Lackawanna and Western Railroad Company, New York, New Haven and Hartford Railroad Company, and Boston and Maine Railroad Company. 285

Joseph F. Keany and Alfred A. Gardner, Pennsylvania Station, New York city, appearing for the Long Island Railroad Company.

H. A. Raylor, 50 Church street, New York city, appearing for the Erie Railroad Company; New

286 Jersey and New York Railroad Company, and Bath and Hammondsport Railroad Company.

C. L. Andrus, 3714 Grand Central Terminal, New York City, appearing for the New York, Ontario and Western Railway Company.

William L. Barnett, New Haven, Conn., appear-
287 ing for the New York, New Haven and Hartford Railroad Company; Central New England Railway Company, and Boston and Maine Railroad Company.

Alfred G. Hagerty, 717 Munsey building, Washington, D. C., appearing for the Ulster and Delaware Railroad Company.

R. W. Barrett, 143 Liberty street, New York
288 city, appearing for the Lehigh Valley Railroad Company.

Charles L. Hunter, 143 Liberty street, New York city, appearing for the New York Central Railroad Company.

Henry Wolf Bikle, 231 Broad Street Station,
289 Philadelphia, Pa., appearing for the Pennsylvania Railroad Company.

W. D. Waldron, 32 Nassau street, New York city, appearing for the Delaware and Hudson Company.

John Adikes, 200 Fulton street, Jamaica, New York city, appearing for the Jamaica Board of Trade.

290 Vincent Victory, Assistant Corporation Counsel, Municipal building, New York city, appearing for the city of New York and its inhabitants.

John Rolley Clark, Jr., 120 Broadway, New York city, appearing for the Chamber of Commerce of the Borough of Queens.

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Ledyard P. Hale, Albany, N. Y., appearing for the Public Service Commission, State of New York, Second District. 291

Edward G. Griffin, Albany, N. Y., Deputy Attorney-General, appearing for the State of New York.

John A. Mullen, New York city, N. Y., appearing for the Public Service Commission, First District. 292

PROCEEDINGS

Exam. LaRoe: Gentlemen, the Interstate Commerce Commission has assigned for hearing this morning, *Docket No.* 11623, *In the Matter of Interstate Rates and Fares of the New York Central Railroad Company, and Other Carriers in the State of New York.* 293

Who appears for the State of New York?

Mr. Hale: Mr. Griffin, for the Attorney-General, Deputy Attorney-General of the State, and Mr. Hale, myself, for the Public Service Commission of the Second District, which I believe in this State includes all steam railroads. 294

Exam. LaRoe: Who appears for the carriers?

Mr. Paulding: I appear for practically all the carriers, with the exception of the Pennsylvania railroad and the Delaware and Hudson, who are represented by their own counsel.

Mr. Waldron: I appear for the Delaware and Hudson Company, W. D. Waldron. 295

Mr. Bikle: Mr. Bikle, for the Pennsylvania.

Exam. LaRoe: Are there any other appearances for the carriers?

Mr. Keany: The Long Island Railroad Company appears by Mr. Joseph F. Keany.

296 Exam. LaRoe: Are there any other appearances?

Mr. Hagerty: A. G. Hagerty, for the Ulster and Delaware.

Mr. Clark: I appear for the Queens Borough Chamber of Commerce, John Holley Clark, Jr.

297 Mr. Victory: John P. O'Brien, Corporation Counsel of the city of New York, by Vincent Victory, Assistant Corporation Counsel.

Mr. Andrus: C. L. Andrus appears for the New York, Ontario and Western.

Exam. LaRoe: Are there any other appearances?

298 (No response.)

Exam. LaRoe: The issues are pretty clearly defined in the Commission's order, *dated September 8th*, part of which I will read:

"In the Matter of Intrastate Rates and Fares of the New York Central Railroad
299 Company and other carriers in the State of New York.

"It appearing, That by order in Ex Parte 74, Increased Rates, 1920, 58 I. C. C. 220, carriers operating within the State of New York were permitted to increase intrastate passenger fares and charges 20 per cent, excess baggage rates 20 per cent, surcharge upon passengers in sleeping and parlor cars
300 50 per cent and the rates on milk and cream when carried on passenger cars 20 per cent;

"It further appearing, That a petition has been filed on behalf of all the steam railroads operating in the State of New York averring that the State of New York Public Service Commission, Second District, by report and order promulgated on the 19*th day of August*, 1920, refused to permit increases for intra-

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state traffic similar to those permitted by this Commission for interstate traffic as set forth in the preceding paragraph;

"It further appearing, That said petitioners allege that the observance by themselves of said order of the New York Public Service Commission, Second District, will cause and result in undue and unreasonable preference and advantage to intrastate commerce, to the 302
undue and unreasonable prejudice and disadvantage of interstate commerce and will result in unjust and unreasonable discrimination against interstate commerce.

"And it further appearing, That by the said petition there have been brought to issue rates, fares and charges imposed by the authority of the State of New York;

"It is ordered, (1) That an investigation 303
be, and it is hereby instituted to determine whether the rates, fares and charges required by the State of New York Public Service Commission, Second District, to be maintained by said railroads, cause or will cause any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one 304
hand and interstate commerce or foreign commerce on the other hand, or any undue, unreasonable or unjust discrimination against interstate or foreign commerce; and as to what rates, fares and charges, if any, or what maximum or minimum, or maximum and minimum shall be prescribed to be charged by the petitioners, in order to remove such 305
advantage, preference, prejudice or discrimination, if any, as may be found to exist.

At this point I should say, perhaps, that I am advised that Mr. Smith, the General Passenger Agent of the New Haven Railroad, intended to be here, but his train will be somewhat late. I

306 would like to determine informally about how long this proceeding is going to last.

(Here ensued an informal discussion off the record.)

Mr. Hale: I think perhaps now is the time to interpose objection, but it is fair that the Inter-
307 state Commerce Commission should be duly appraised of the position of the Public Service Commission, and Mr. Griffin can speak, of course, with regard to the State of New York. We object to any proceeding or any evidence or any hearing in this matter, because there is not any proper complainant. In other words, no person inter-
308 ested in interstate as opposed to state rates has made any complaint of the state raise. I do not understand that it is a proceeding instituted of its own motion by the Interstate Commerce Commission, but that it is a proceeding instituted on motion of the carriers, the New York Central and other railroads. I do not think they can raise
309 that point, *and especially as they have not asked the state to increase their local rates.* Now, in all of this time that the New York Central has had and the other railroads — I speak of the Central as perhaps governing all of them — it is our largest sinner in the state, because it is the largest railroad in the state, and because of the statute of the state, which has been in existence since be-
310 fore the New York Central Railroad — now, there has not been a suggestion to the Public Service Commission that the 2-cent rate, for example, for way passengers between Albany and Buffalo was insufficient, either to pay for the service or to yield an income on the cost of the railroad or to yield a reasonable return on the value of the prop-

erty employed in passenger transportation, and 311
for that reason we claim that the Interstate Commerce Commission ought not to be moved to this investigation. The Examiner stated he would like to know about how long the hearing is going to take. We are not prepared with any evidence at all and do not expect to introduce any, except 312
on cross examination if there is any evidence that we ought to have which would be easily supplied by the railroad people present.

Exam. La Roe: Your objection will be noted on the record, Judge Hale. Just to get the record clear, am I laboring under a misapprehension *when I think that the carriers have petitioned the Public Service Commission of the Second District* 313
for authority to put in the increased fares?

Mr. Hale: They petitioned for authority to put in the increased fares because, and only because they were put in by the Interstate Commerce Commission. They want us to O. K. for State rates exactly what the Interstate Commerce Commission did. 314

Exam. LaRoe: And your position is, as I understand you, that you feel that the carriers have failed to establish the insufficiency of the present fares under the language of the statute.

Mr. Hale: They have introduced no evidence bearing on that question, as I understand it, and 315
certainly they have not asked the Public Service Commission to increase the rates.

Now, I want your assent to my assertion, representing the New York State Commission, that the statute of New York has vested the Public Ser-

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316 vice Commission of the Second District with sufficient power to enable them, from proper proof, to raise the passenger rate to 3.6 by any of the tests which have now become established in the United States, the reasonable income on the value of the property in public use, or any other test
317 that you please that has been recognized by the Supreme Court of the United States, and furnishes the basis of its daily work by the Interstate Commerce Commission, especially under the valuation scheme of the Interstate Commerce Commission There has not been proffered to us, not even indirectly, a proposition to increase these rates so that the State rates should be equal to the
318 interstate rates. There won't be any quarrel, as a matter of fact, on my part that when I went to Chicago the other morning and got on at Albany and rode to Buffalo, and paid 3.6 and my friend got on the train and rode to Buffalo and paid 3 cents, that there is a difference between the State and interstate rates. We do not contend there is
319 no difference. We do not contend that that may not constitute a discrimination, but nobody has asked us on any basis whatever, either from actual value of service or actual financial need of the carrier to increase it.

Exam. LaRoe: As I understand the carriers' position, your position on the subject of discrimi-
320 nation is that as a matter of discrimination between intrastate commerce on one hand and interstate commerce on the other, it is a matter of determination by another tribunal, and you feel the carriers should establish it before you put the insufficiency of the present rates —

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Mr. Hale: I might answer yes, and yet I think 321
due to you, representing the Interstate Commerce Commission, I should go a step further and to deny the authority of Congress, under the Constitution of the United States, to do what it has done respecting the relation between interstate and State rates.

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Exam. LaRoe: You mean by that, that you deny the power of Congress to vest in the Interstate Commerce Commission authority to require the removal of undue prejudice, if found to exist between State and interstate rates.

Mr. Hale: I always like to state the question exactly as I see it. My point is that I believe that 323
the State still has under the Constitution the power to determine in a state what is a reasonable rate for a railroad in the carriage of freight or passengers. Now, I am aware of the Shreveport decision. I am aware of the Illinois case. I am aware of the Minnesota rate cases. Of course, we have got to accept this as part of the jurispru- 324
dence of the United States, but to go beyond that and branch out entirely and to give to the Interstate Commerce Commission the power over local rates, absolutely to fix them, and the only standard of doing that which is fixed by the Interstate Commerce Commission, that we object to, and we hope to prevail ultimately on that contention.

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Exam. LaRoe: You have stated your position so fully and freely that I hesitate to ask you to develop it further, but do you distinguish between the matter of reasonableness or the sufficiency of the rates and the matter of discrimination?

326 Mr. Hale: I do not quite know where we would have to argue that ultimately. Of course, I must concede that where a rate fixed by a state, is a direct interference with the power of Congress, as declared now in the Shreveport and other cases, or perhaps not the power of Congress declared there, but the result of the provisions of the Con-
327 stitution, giving Congress the power over interstate commerce, we come right up to the square conflict there and of course the State has got to yield. It cannot help it, but I do want in all legitimate and proper ways to urge upon the Interstate Commerce Commission, of course, through you, that Congress has not in the first place —
328 that it has not done it; in the second place, that if it has tried to do it, it could not remove all jurisdiction of the State of New York over the rates of the New York Central Railroad and other railroads.

Mr. Paulding: I think it is only fair to state
329 for the purpose of the record —

Mr. Griffin: May I put in my objection?

Mr. Paulding: Pardon me just a moment. In the hearing before the Public Service Commission, upon the petition of the carriers to put in the tariffs blanket supplements, showing the in-
330 creased rates, the entire record before the Interstate Commerce Commission was offered in evidence and accepted.

Mr. Hale: I assume that is true. I was not there.

Exam. LaRoe: Were they physically filed with the New York Commission?

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Mr. Paulding: The New York Commission had a copy in their possession, and that prompted us to make the formal offer, and they stated they would use that copy. 331

Mr. Hale: There won't be any point about the physical presence, if that is true, of course.

Exam. LaRoe: May I ask if any one else would like to be heard? 332

Mr. Clark: I would like to make one additional objection to what Judge Hale has said, particularly as regards the Long Island Railroad and the City of New York, in which the people of Queens are particularly interested, of course. The Long Island Railroad has not interstate passenger traffic at all. Of course, the force of Mr. Hale's argument about the jurisdiction of the Interstate Commerce Commission and Congress, itself, is particularly forceful in the case of the Long Island. There are no ways by which the Long Island rates could directly compete with the interstate rate, under the theory of the Minnesota Rate cases and it seems to me that if the Interstate Commerce Commission is to take jurisdiction of the local rates on what is really a rapid transit railroad in many respects, which has a majority of its traffic in the city of New York, and in many cases runs parallel to and competes with the city rapid transit lines, why then I say that if this Transportation Act authorizes any such interference with local rates on the Long Island Railroad, it ought to also authorize its interference with the local rates on the city rapid transit lines. You could just as well increase the five-cent fare on the sub- 333 334 335

336 way as you could increase the rates on the Long Island Railroad. That is the preliminary objection I make, and then if the court desires or wishes to continue the Long Island Railroad in this hearing, why, I want to point out that the rates on the Long Island Railroad have always been higher than those on the New Jersey roads;
337 that in spite of the 20 per cent increase granted to the New Jersey railroads, the Long Island commutation rates to the Pennsylvania station are still higher than those on the New Jersey roads. The fifty-trip rates on the Long Island Railroad are higher than those in the New Jersey railroads, and in many cases the single and
338 round-trip fares on the Long Island Railroad are higher than on the New Jersey roads with their increase.

Exam. LaRoe: Are there any other preliminary remarks?

Mr. Griffin: If the Examiner please, on behalf
339 of the Attorney-General, instead of joining Judge Hale's objections, I want to make some of my own. I object first on the ground that the petitioners may not be heard here, complaining against any discrimination as between interstate and state rates; that only some person who suffers from that discrimination may be heard.

340 Exam. LaRoe: I do not have a copy of the new law before me, but as I recall it, it specifically authorizes a carrier to file such a petition. Am I incorrect in that?

Mr. Paulding: I will read it.

341 Mr. Griffin: Will you wait until I finish?

Mr. Paulding: Yes.

Mr. Griffin: And secondly, I object to this petition, upon the ground that there can be no discrimination in passenger rates where a passenger steps off at a station and buys a state ticket.

342 Thirdly, upon the ground that so far as the two-cent fare on the New York Central is concerned, and so far as their rates are concerned, they constitute charter contracts which Congress may not by its authority, delegated to the Interstate Commerce Commission, impair.

343 Exam. LaRoe: Those objections will be noted in the record.

Mr. Paulding: I wish to call attention upon the record to the language of section 13. It is in the third subdivision of section 13 of the Interstate Commerce Act:

> 344 "In any investigation upon the petition of the carrier concerned, which petition is hereby authorized to be filed"—

Exam. LaRoe: I think that is enough. That is part of the law I had in mind.

Mr. Victory: The corporation counsel of the city of New York joins in the objection of counsel for the Public Service Commission of the Second District, Mr. Griffin and also Major Clark. 345

Exam. LaRoe: Now, apparently with a little pressure we shall be able to finish today.

Mr. Taylor: On behalf of the Erie Railroad, I would like it known before you start that Mr.

346 Paulding represents some witnesses who will speak for us, as well as for other railroads, but we may find it necessary to have some short time to present some facts peculiar to the Erie Railroad.

Exam. LaRoe: Very well. For the informa-
347 tion of those present I will say, although I assume it to be generally known, that a very similar proceeding is now pending with regard to the rates in the State of Illinois. I think that that is now in course of hearing in Chicago, although I am not generally advised.

Mr. Hale: It is. I was there on Saturday.

348 Exam. LaRoe: Mr. Paulding, are you ready to proceed?

Mr. Paulding: I do not know that a formal opening is necessary in a proceeding before the Commission, but briefly I will say this, Mr. Examiner: In the State of New York there are
349 58 steam railroads. Of these, ten have no passenger revenue. Of the remaining forty-eight, thirteen have total passenger revenues of over a million dollars a year. The main roads concerned in that revenue are the New York Central, the Erie, the Delaware, Lackawanna & Western, the Lehigh Valley, the Long Island, the Ontario & Western, the New Haven Railroad, Buffalo,
350 Rochester & Pittsburg and Delaware & Hudson. The other interstate roads doing a business of over a million dollars have a small mileage in New York. The intrastate business of the roads I have named is very large. It amounts to about fifty million dollars a year, roughly speaking.

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The milk and cream business is very large, 351
amounting to several million dollars a year, which I will prove. The surcharge upon Pullman tickets, which has been denied by the Public Service Commission would amount to a great deal a year, as prior to the time the Pullman Company was allowed 20 per cent increase on their charges, their intrastate income in the State of New York for 352
local tickets was about $1,400,000 a year. The interstate railroads in the State — all railroads in the State are interstate railroads, excepting as to New York State traffic on the New York Central, which business New York and Buffalo is entirely an intrastate line, New York being selected as one end of the State and Buffalo being at the end of 353
the Great Lakes — the New York Central is an intrastate line. The West Shore line, a leased line of the New York Central, is an interstate line, and parallels the New York Central for its entire length. The Lehigh Valley, Delaware, Lackawanna & Western and Erie are all interstate lines, going through the states of New Jer- 354
sey and Pennsylvania and passing in and out of New York and Pennsylvania.

Exam. LaRoe: May I interrupt on one point? Did you say the New York Central line between Albany and Buffalo?

Mr. Paulding: Between New York and Buffalo.

355

Exam. LaRoe: Of course, that portion of the line is an intrastate line, but that is not all there is.

Mr. Paulding: I am speaking entirely as to New York state.

356 Exam. LaRoe: I do not get the force of the distinction you are drawing, because the West Shore Railroad is an intrastate line with respect to that portion of the line that is in the state.

Mr. Paulding: Not as between New York and Buffalo.

357 Exam. LaRoe: No, not as between New York and Buffalo.

Mr. Paulding: That was the point I was trying to make.

Exam. LaRoe: I see.

358 Mr. Paulding: There are other points in the state of New York which have the same geographical position, not only in the southern part of the state, but in the western part of the state, the central and northern part of the state.

Exam. LaRoe: How many of the railroads that
359 are here involved are physically totally intrastate carriers?

Mr. Paulding: One.

Exam. LaRoe: Which one is that?

Mr. Paulding: New York Central Railroad. That is as to its New York state business. Of
360 course the New York Central Railroad, runs through seven states.

Exam. LaRoe: Is there any railroad that is here respondent that has its whole line within New York state?

Mr. Paulding: Oh, yes, the Ulster & Delaware.

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361 Mr. Taylor: I appear for the Bath & Hammondsport, a small branch of the Erie.

Mr. Paulding: There are several roads in this proceeding which are not only entirely within the state of New York, but the great bulk of their income—

362 Exam. LaRoe: Mr. Clark made that statement clearly in regard to his road, and I was just wondering to what extent that is true of the others.

Mr. Paulding: That is true as to perhaps half of the forty-eight roads which I have mentioned, but they all do an interstate business.

363 Mr. Clark: The Long Island does not.

Mr. Gardner: The Long Island does an interstate business. The Long Island does an interstate passenger business. The tariffs show it.

Mr. Paulding: With that short opening I will call Mr. Porter.

364

LeRoy B. Porter was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct Examination:

Q. (By Mr. Paulding.) What is your occupation, Mr. Porter? A. Assistant Controller of the 365 New York Central.

Q. Have you secured from a number of railroads in the state of New York, statements of their intrastate revenue in the state for certain periods as to passenger, and as to milk and cream divided in that way? A. Yes, sir, I have.

366 Q. What rates have you? A. I have the Pennsylvania; the Delaware, Lackawanna & Western; the New York, Ontario & Western; Long Island; Buffalo, Rochester & Pittsburg; the New York Central; the Erie; the Lehigh Valley; the New York, New Haven & Hartford; the Central of New England and the Delaware & Hudson.

367 Q. (By Exam. LaRoe.) Do you have that in exhibit form? A. Why, some of them only came in this morning and I haven't had them typewritten.

Mr. Paulding: I have given Judge Hale a copy of it, so far as it was prepared up to ten o'clock this morning.

368 Exam. LaRoe: Will you file it later as an exhibit?

Mr. Paulding: Yes.

(The statement was thereupon received in evidence, marked "Defendants' Exhibit No. 1, Witness Porter," and is forwarded herewith.)

369 Q. (By Mr. Paulding.) Is that divided as to passenger revenue, so-called, and milk and cream revenue? A. Yes, sir; it is.

Mr. Hale: I do not suppose, Mr. Examiner, it is necessary to repeat? Our point is considered?

370 Exam. LaRoe: Your fundamental objection will go all through the proceedings. Proceed, please.

Q. (By Mr. Paulding.) What was the total intrastate revenue, passenger, of these lines for the calendar year 1919 as you have secured the figures? A. Why, I have not got the total passenger, Mr. Paulding. I only have the total as to all

of the revenue, which includes the passenger, excess baggage and milk and cream, and the total of that for the year ended June 30th, 1920, was $55,605,322.43. 371

Q. Have you secured from the Pullman Company a statement of their intrastate earnings in the state of New York during the year 1919? A. Yes, sir; we have a statement from the Pullman Company, which shows that their intrastate earnings in the state of New York for the year ended December 31st, 1919, was a total of $13,555,807.55, and that was before they had any benefit of the 20 per cent increase in Pullman fares. 372

Q. Have you figures from the Pullman Company, or have you not, as to the six months figures for the first six months of 1920, which includes two months of the 20 per cent increase? A. Yes, sir. 373

Q. Where are those and what are they? A. The total of those for the six months to June 30th, 1920, is $810,898.14.

Q. Now, take these three figures which you have given, Mr. Porter, the passenger revenues intrastate in the state of New York, and the Pullman figures, will you say what, if the rate of increase authorized by the Interstate Commerce Commission had been in effect during the period you have covered, would have been the difference in the figures you have given and the figures as they would be by adding 20 per cent? A. Yes, sir; on the passenger, excess baggage and milk and cream, the effect is a loss of $11,121,066. 374 375

Q. (By Exam. LaRoe.) That is on the basis of the year? A. On the basis of the business done for the year ended June 30th, 1920.

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376 Q. May that then fairly be regarded as the annual amount that is involved in this proceeding? Does that represent the annual difference between what the rates would be, if they were on an interstate basis as compared with what they are on the intrastate basis? A. Yes, sir; assuming of course that the same amount of business is
377 done throughout.

Q. I just wanted to get in my mind an idea as to the amount in controversy here, and as I understand you it is in the neighborhood of eleven million dollars a year? A. That is on the passenger, excess baggage and milk and cream, and in addition to that the loss on the surcharge from
378 the figures which have been furnished by the Pullman Company would mean about eight hundred thousand dollars additional.

Q. About twelve million dollars, in round figures? A. About twelve million dollars, yes, sir.

Q. Do you have any information showing how that figure of fifty-five million dollars which you
379 gave for the intrastate business, compares with the total interstate business into and out of the state of New York? A. I have not that, only for the New York Central. I would say that the New York Central's intrastate business is about 35 per cent.

Q. That is to say —. A. Of their total passen-
380 ger business in the state of New York — their total passenger business in the state of New York is about 70 per cent of their total passenger revenue.

Q. Well, now, let me get that. That is important, if true.

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Mr. Paulding: I was coming to that. 381

Exam. Le Roe: Pardon the interruption. Perhaps I had better let you proceed.

Q. (By Mr. Paulding.) Now, your figures have been based upon the assumption that the traffic is the same? A. Yes, sir.

Q. And without taking into account any difference that may be made as between interstate and intrastate fares, by a reduced rate or an increased rate? A. Yes, sir. 382

Q. The Examiner has asked you some questions as to the interstate rates. I show you a paper. This is a carbon copy. I have used the original and I ask you if you know what that is. A. This is a statement of the annual and quarterly revenues received from milk and passenger train service on steam railroads reporting to the Public Service Commission of New York for the year ending December 31st, 1919, and for the quarter ended June 30th, 1920. 383

Q. That is for all the steam railroads in the state reporting to the Public Service Commission, is it not? A. As far as I know, it is. 384

Mr. Paulding: I will say for the information of the Examiner this is furnished me by the Public Service Commission.

Q. (By Mr. Paulding.) That shows the total revenues of all of the roads — the total passenger revenues for the year 1919 for all of the roads reporting to the Public Service Commission? A. Yes, sir. 385

Q. Making the total about $315,000,000? A. Yes.

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386 Mr. Paulding: That is all I wish to ask. I will offer that and I will furnish copies.

(The statement was thereupon received in evidence, marked "Defendants' Exhibit No. 2, Witness Porter", and is forwarded herewith.)

387 Q. (By Exam. LaRoe): That figure includes all revenue, both state and interstate, does it — all passenger revenue, both state and interstate? A. Yes, sir.

Q. For example, includes interstate revenue —

Mr. Paulding: That is the total passenger revenues.

388 Exam. LaRoe: The question that I asked was whether you have a figure, showing the total passenger revenue, interstate between New York and other states.

Mr. Paulding: No; the only figures we have are the intrastate figures for New York and these
389 total figures.

Exam. LaRoe: Of course, the only interstate passenger business that is here in issue is that into and out of the state of New York, and you have no figures showing what that is.

Mr. Paulding: I have no figures showing what
390 that is.

Cross Examination:

Q. (By Mr. Hale.) I would like Mr. Porter to be just a little more definite in how he arrives at the estimate he has given as to what the effect, for example, of an order of the Interstate Com-

merce Commission, put into effect now, based upon the figures he has given, would be annually or otherwise. A. That is on a 20 per cent basis? Of course, the figures which I have submitted are the passenger revenues, excess baggage, milk and cream on the basis of the tariffs as they now exist or before the 20 per cent increase was granted by the Commission. Now, of course, by applying to that amount 20 per cent, which was the increase we would get under the Commission's ruling, why, that would give us approximately twelve million dollars. 391 392

Q. Now, you are assuming in that — I think Mr. Paulding was fair about that in his question and I want to be quite sure — you are assuming that the advanced rate for the intrastate service — domestic service — would not diminish the traffic? For instance, take the Pullman cars. You are assuming that the revenue would be increased, and are not assuming that people would use the Pullman and pay twice as much for it. A. No, sir; not assuming that. These are the figures that were compiled for the year ending June 30th, 1920. We have made no assumptions. 393 394

Q. When you go into the future, is not the assumption, in order to raise this additional revenue — is not the assumption necessary that the number of people who use the Pullman will not be diminished? In other words, a man will pay twice as much for his Pullman and continue to do that? A. That might make some difference. I do not know as to that. 395

Exam. LaRoe: I will ask Mr. Paulding to be careful to see that copies of these exhibits are

396 furnished to all persons whose appearances are entered here.

Mr. Paulding: Every one who wants one.

Mr. Adikes: Mr. Chairman, I wish to be entered as appearing for the Jamaica Board of Trade.

397 Exam. LaRoe: What is the name?

Mr. Adikes: John Adikes, Chairman Transit Committee of the Jamaica Board of Trade.

CHARLES L. HUNTER was thereupon called as a witness, and having been duly sworn,

398 testified as follows:

Direct Examination:

Q. (By Mr. Paulding.) What is your occupation? A. Assistant to Chairman, Trunk Line Association, Passenger Department.

Q. Have you been with the Trunk Line Asso-

399 ciation for a length of time? A. Some thirty years.

Q. What positions? A. I have occupied substantially every position in that organization, from statistician, rate clerk, secretary and assistant to the Chairman.

Q. Has your experience in that position been

400 confined especially to passenger or freight, or has it included both? A. Substantially and almost exclusively to passenger traffic, sir.

Q. Has that experience given you an opportunity to become familiar with the passenger condition of the different states, as to rates and as to the physical conditions? A. It has, sir.

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Q. And in the state of New York particularly? 401
A. Yes, sir.

Q. Your office has been in New York most of these years? A. Entirely.

Q. Are you familiar with General Order 28 of the Director General, Mr. Hunter? A. Yes, sir.

Q. That was an order fixing passenger fares throughout the country, was it not? A. It was. 402

Q. At what rate? A. On a basis of not less than three cents per mile. In other words, where any rates were less than three cents per mile they were advanced to that minimum.

Q. Did that affect any rates within the state of New York? A. It did, sir.

Q. For instance, what rate? A. It had the effect of increasing the intrastate rates in the state 403
of New York which ranged from two to three cents per mile, to a minimum of three cents per mile.

Q. Does that traffic rate continue? What is the present rate of fare for passengers within the state of New York? A. The present fare for pas- 404
sengers interstate in the state of New York is 3.6 cents per mile.

Q. And intrastate? A. Three cents per mile.

Q. How long has that interstate fare been in effect? A. Since August 26th, 1920.

Q. Are you familiar with the status in the statute of New York governing the issuance of mile-
age books? A. Yes, sir. 405

Q. What is that? A. It requires that a mileage book be issued in denomination of five hundred or a thousand miles, good for bearer on the basis of two cents per mile.

406 Mr. Paulding: At this point I will ask to have read in evidence Section 57 of the Railroad Law of the state of New York and Section 60 of the law of the state of New York.

Exam. LaRoe: Those sections are quoted in your petition.

407 Mr. Paulding: They are quoted in my petition. I will furnish copies.

Q. (By Mr. Paulding) Has there been any action of any kind by the state of New York towards requiring the re-establishment of mileage books? A. Not as yet.

408 Mr. Hale: I wrote a letter to Mr. Paulding. There are several things — for example, the mileage book, the checking of baggage, such as bicycles and several other things, which rest exclusively on the state statute and I made the suggestion to him that I bring a summary proceeding under our statutes, making all operating railroads defendants, not on the ground that they 409 were jointly interested in any act, but on the ground that they are all jointly interested in the principle involved and suggesting that we proceed in a non-technical way and have the Court decide the question.

410 Exam. La Roe: It would be in the nature of a proceeding to require the carriers to show cause. It would be a mandamus proceeding.

Mr. Hale: It is called a summary proceeding, but it is mandamus really. Here is the Ulster & Delaware made an application to the Commission

some years ago, on the theory that the Commission had power to increase this two cents a mile under the mileage book law, and the Court held that the Public Service Commission had that power, and acting under it they raised that rate to 2.9 cents per mile. In other words, if they were going to charge 30 cents for the book, there would not be any object in issuing it. 411 412

Exam. LaRoe: Then it is the intention of your Commission to see to it that the railroads are required to conform to all of the provisions of the state statutes?

Mr. Hale: It is our intention to take that case in the Court of the state of New York, with full knowledge, of course, that if the state goes wrong — 413

Exam. LaRoe: I see. Proceed.

Mr. Hale: Does the Examiner know what we have had in this state? The Federal judges decided that the state had authority over state matters, and a state judge deciding that it did not. 414

Exam. LaRoe: Proceed, please, Mr. Paulding.

Q. (By Mr. Paulding.) Did Order 28 of the Director-General concern mileage books in any way, Mr. Hunter? A. Yes, sir; it did.

Q. What happened as to that? A. It directed that all fares should be brought, as I have said before, to a basis of three cents per mile, and mileage books were on sale at that time, generally on the basis anywhere from two cents to two and one-quarter cents a mile, and those books were 415

416 continued to be honored on the basis of the full tariff rates, namely three cents per mile, and in 1918 the Director-General decided that they should be withdrawn, and a so-called interchangeable script book sold in denominations of $15, $30 and $90, at their face value, and be accepted for
417 transportation on the basis of the full tariff fares, and since Federal control those book have been kept on sale.

Q. But the mileage book as such is not sold to-day? A. The mileage book as such is abolished in all parts of the country. There are none of them in effect or on sale whatever.

Q. As to these script books, what is the fare that
418 is being taken when they are presented to-day? A. On interstate, 3.6 cents per mile, and on intrastate, in New York state, three cents per mile.

Q. (By Exam. LaRoe) What are those script books? A. Nothing more or less than the equivalent of money and they are accepted for transportation fares, baggage and various other transpor-
419 tation charges. In other words, more as a matter of convenience than really money value. In other words, their value they have to whoever buys them is the fact that they afford a facility to the frequent traveler.

Q. Do you have any objection to the continuation of these? A. No, sir.

420 Exam. LaRoe: Are they involved in any way here in this proceeding?

Mr. Paulding: Except as to the price, that is all.

Exam. LaRoe: As to the fare level?

Mr. Paulding: As to the fare level, that is all. 421

Q. (By Mr. Paulding) Your experience, of course, has made you familiar with the effect of the geographical situation the State of New York has on the passenger rate structure in the east? A. Yes, sir.

Q. What is that effect? A. Well, the effect is 422 that New York and Buffalo, being such important commercial centers that they practically are a fundamental key, you might say, to the entire rate fabric of this country. You cannot disturb the rate between New York and Buffalo or Albany and Buffalo, for instance, in this particular instance and make it three cents a mile against 3.6 423 cents a mile, without very seriously affecting the entire rate fabric of the country.

Q. Will you enlarge that a little bit and show how and in what way, as a practical matter, that statement of yours works out? A. Passengers can take advantage of the lower intrastate fares of the New York Central from New York and 424 other points to Buffalo, to secure through transportation at less than the interstate fares on combinations, by buying tickets to Buffalo and repurchasing therefrom, as illustrated by the following examples:

Through fare New York to Cleveland, which is interstate, $20.52. Combination New York to Buffalo, intrastate, $13.16, Buffalo to Cleveland, 425 interstate, $6.56; total $19.72, or on repurchase a saving of 80 cents on every ticket.

Q. And as to the surcharge on Pullman, is there a difference as to that? A. With respect to the surcharge on Pullman, not being collected in the

426 State of New York, it means a passenger riding from New York to Buffalo in a sleeping car is enabled to save $1.25, which is the rate on which the surcharge is based, while other lines direct between New York and Buffalo, being intrastate, passengers would not be enabled to get through at
427 less than paying the $1.25 surcharge.

Q. (By Exam. LaRoe) Does that mean on the through passenger traffic from New York to Cleveland, the interstate fare would be defeated to the extent of $2.05 for a passenger traveling in a sleeping car? A. Yes.

Q. (By Mr. Paulding) What are the roads run-
428 ning between New York and Buffalo — the main railroads? A. The New York Central, as you have claimed, wholly in the State of New York. The other lines are the Delaware, Lackawanna & Western, the Erie, the Lehigh Valley and the West Shore.

429 Q. Are these interstate lines? A. All lines except the New York Central are interstate.

Q. As to other points in the State of New York, is Syracuse an important commercial center? A. Yes, it is.

Q. Is Rochester an important city? A. It is

Q. Is Ogdensburg a large city? A. It is, in the northern section of the State.

430

Mr. Hale: I am glad to hear that evidence.

Q. (By Exam. LaRoe.) Is there any evidence showing that as a fact what you fear is really happening? That is to say, that passengers are stopping off and rebuying? A. Mr. Commissioner,

we have some cases, but this arrangement as you 431
can appreciate has only been in effect a very short time, since August 26th, and comes in the season when the Labor Day traffic was on, which was exceedingly heavy, and we are not in a position at the moment to give any very concrete cases, but from our general knowledge and experience in the 432
situation, we know that there are shoppers or bargain hunters in transportation, the same as there is in other lines of business, and particularly on the part of frequent travelers. For instance, those engaged in commercial pursuits, so that we feel more than confident that these advantages that are possessed by the New York Central Railroad are going to be taken advantage of by 433
passengers to a considerable extent.

Q. I do not understand that you directly answered Mr. Paulding's inquiry, which is one I am considerably interested in, and that is the extent to which, if any, the lower rates between Buffalo and Albany will affect the through passenger rates between the east and the west. Will it, 434
in your judgment, require a reduction in the interstate fares below their present level, or will it merely facilitate the defeat of the interstate fares through repurchase? A. Well, Mr. Examiner, in that regard, in addition to the possible manipulation of the rates on the part of passengers, as I have said before, a situation of this kind is very 435
serious, in that there are other arteries of travel that are affected by it. For example, between New York and Chicago, as I explained before, Buffalo is a very important gate-way. The New York Central operates via that gate-way. These

436 opportunities for repurchase are there. Now, there are other lines operating via various other gate-ways, through Pittsburg, Salamanca, Wheeling, through Parkersburg, and the lines being on their own bottoms, under existing conditions, and competition being an element in the conduct of
437 the properties, you can see that sooner or later there is going to be an agitation on the part of these lines which are adversely affected, to bring about some parity of conditions that exist under a normal basis of making interstate rates, that is one of the things that is involved in this whole situation.

438 Q. (By Mr. Paulding) Now Mr. Hunter, going to the New York-Buffalo situation, what is the intrastate rate between New York and Buffalo? A. The intrastate rate between New York and Buffalo is $13.16 over the New York Central.

439 Q. And take the other lines between New York and Buffalo, what is the rate under present interstate rates over those lines? A. $14.27.

Q. All of those rates being larger? A. They are.

Q. Assume, if you will, that the New York State rates continue in effect, three cents a mile, what will be the ultimate effect on the other rates between New York and Buffalo? A. Well, judging
440 by past experience, I should say that they might not endure for any great length of time.

Q. Would they have to meet the New York State rate? A. They would, sir.

Q. Decrease interstate rates to that extent? A. I think it would, inevitably.

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441 Q. Prior to Federal control and of General Order 28, what was the basis of the rates interstate between New York and Chicago? A. The rate was on the basis of two and one-half cents per mile and no combinations over any intermediate points that reduced it.

442 Q. Did the rate between Buffalo and Albany have any effect on the through rate at that time? A. No, sir.

443 Q. Assume that the three-cent rate from New York to Albany were continued in effect and the two-cent rate were in effect between Albany and Buffalo, would that as an intrastate combination affect the interstate rate between New York and Buffalo? A. Yes, sir; it would reduce the rate from $13.16 to $10.21 combination. I might say for the record, being on the basis of three cents a mile New York and Albany and two cents a mile between Albany and Buffalo.

444 Q. If a mileage book were required to be sold in the State of New York at two cents a mile, would that affect in any way the through rate intrastate between New York and Buffalo and the through rate interstate between New York and Buffalo? A. It would have the effect of establishing a rate between New York and Buffalo of $8.78, and taking New York to Chicago, for illustrative purposes the through rate interstate is $32.67,

445 while the combination of the New York-Buffalo 2-cent mileage book, $8.78, the Buffalo-Chicago interstate fare of $18.81 would establish a through rate of $27.59, or a difference of $5.08 per ticket.

Q. Now, answering me from your experience in the passenger business in all these years you have

446 been in it, would that or would it not be the inevitable effect of the sale of mileage books, or the continuance of the three cent fare in the State of New York? A. Beyond question.

Q. (By Exam. LaRoe) Is it possible to police your passenger traffic in such a way as to prevent
447 abuse of the interstate fare? In other words, is there any practical way to prevent a man who wants to repurchase a ticket at Buffalo from doing so? A. I should say, as a practical matter, Mr. Examiner, only get a very small proportion of such cases, for the reason that most of the service at Buffalo is broken. It is a point where a change
448 of motive power is made and passengers have opportunity, if they are so disposed, to jump into the station and get a ticket from Buffalo to their interstate destination. Similarly, reversing it, you have the same situation to New York.

Q. If the basis of $13.16 continues from New York to Buffalo via your line, whereas the basis
449 of $14.20 is continued between the same points via the other routes, is that difference, in your judgment, enough to divert a substantial amount of passenger traffic from the interstate routes to the intrastate route? A. I would answer that by stating that under normal condition of rates, the greater proportion of the traffic between New
450 York and Buffalo moves intrastate over the New York Central Railroad, and by having a lower rate, logically the traffic would very materially increase over that line.

Q. (By Mr. Paulding) Do you know of your own experience in the last few weeks what has

451 happened in that regard, Mr. Hunter, as to whether the traffic has decreased upon the interstate lines or increased on the intrastate lines between those points? A. I simply know what the traffic officials have told me, that the business is being diverted to the other lines.

452 Q. (By Exam. LaRoe) Are you able to say whether the interstate railroads have taken that matter up with the New York Central and complained about it in any way? A. Yes, sir; they have complained about it, but in view of this proceeding and the matter being, you might say, in abeyance, awaiting the outcome of it, why, they are 453 simply suffering the situation.

Q. (By Mr. Paulding) In other words, the interstate rate is being charged by the interstate railroads, and the intrastate rate by the intrastate road? A. Yes, sir.

Mr. Hale: I suppose your efforts are somewhat 454 altruistic, therefore.

Mr. Paulding: No; I would not say that, Judge Hale. It goes further than the mere matter of rates. The matter of equipment and the matter of service is involved.

Mr. Hale: You are not appearing here selfishly 455 for the New York Central.

Mr. Paulding: If I were appearing only for the New York Central, I would still complain of that rate and that situation. The situation as to the New York Central is a very serious one.

456 Q. (By Mr. Paulding) Take the New York Central — take the two points now, Mr. Hunter, between New York and Buffalo, the stations upon the line of the New York Central, the intrastate road, and the stations upon the lines of the interstate roads, as to the other roads which you have
457 mentioned, do the conditions which you have mentioned as to rates apply only to Buffalo and New York, or do they apply to all the stations in that territory? A. They apply to every common point in the State of New York, Utica, Syracuse, Rochester, Buffalo, Ogdensburg, Plattsburg. I say practically every point where the New York
458 Central is a factor, and then I should say practically the entire State.

Q. Do those conditions or do not those conditions affect stations other than the stations which you have mentioned in the state of New York? A. They do, yes, sir.

Q. Will you say in what way they do? A. Well,
459 they have the effect of establishing lower rates over the New York Central than via the lines doing the interstate business.

Q. And as a practical matter, does that make any difference to a man going, say, from Ithaca, which is not on the main line, to Chicago? In what way would that happen? A. Well, he would in all probability take advantage of the lower rate
460 to Buffalo and repurchase.

Q. Prior to Federal control, following the question asked by Mr. LaRoe a few moments ago, do you know the experience that was had on the extra fare trains between New York and Chicago, as to the practice of passengers beating the extra

fare? What did they do and was it a practical matter? A. They charge an excess fare on certain trains operating between Chicago and New York, but no excess fare was charged between Chicago and Albany, so some passengers — in fact, it grew to quite a practice, would buy a ticket to Albany and then buy their ticket from Albany to New York, and in that way tried to evade the excess fare. The conductors had instructions under those conditions that if they could determine if the passenger was a through passenger, which they were able to do in a good many cases, why, he charged him the excess fare, notwithstanding he was trying to evade it.

Q. (By Exam. LaRoe.) There was no extra fare from Chicago to Albany? A. No, sir.

Q. (By Mr. Paulding.) Was that a well known common practice? A. Yes.

Q. Practiced by many people? A. Yes, sir.

Q. And something that could not be overcome? A. It could not.

Q. In spite of the efforts of the railroad company to do it? A. Mr. Paulding, in connection with that question of manipulation, it was very evident in connection with the central states, when they had two cents a mile there, so much so that the Interstate Commerce commission called upon these carriers to devise ways and means for getting the interstate rates, and they had circulars issued to their conductors and agents. They even had to break the lines at the state borders in order to prevent it.

466 Q. Did that have any effect as a practical matter? Of course, efforts were made, but did it amount to anything? A. I understand in a very small number of cases were they able to protect themselves and get the interstate revenue. I might also present another case here, which is particularly interesting: Taking the line of the
467 New York Central and the West Shore, operating on opposite sides of the Hudson river between New York and Albany, with a substantially like distance, the fare of the New York Central, $4.27, was not advanced as against the increased fare of $5.13 over the West Shore Railroad, which is interstate, while the fares in the past had been
468 the same by both lines.

Q. The West Shore Railroad — do you know what control that is under? A. Controlled by the New York Central, under lease.

Q. And operated by them? A. And operated by them.

Q. Does the West Shore go all the way to Buf-
469 falo? A. It does — practically parallels the New York Central for the entire distance.

Q. Now, these conditions as to the main points which you have mentioned occur practically at every station in the state of New York? A. I should say at every station.

Q. That is if the three cents fare is continued in New York that it is not only probable, but possi-
470 ble that the interstate fare is defeated by practically every passenger who goes in or out of the state of New York? A. Yes, sir, I think that is going to be the inevitable effect.

Q. Will you say what the through fares are between a few of the principal points in the eastern

country, taking some of these instances which you have given to me, from points within the state of New York to points without, Buffalo to Chicago, Buffalo to Boston, etc.? A. Well, the through fare, Albany to Chicago, today, is $29.48; combination Albany to Buffalo intrastate, $8.89; Buffalo to Chicago $18.81, $27.70; a difference of $1.78.

To Boston — Buffalo to Boston, using the same combination, we have a rate interstate of $17.90; and combination, $16.12, or a difference of $1.78. Now, that is true of every rate on the Albany–Buffalo line, no matter where you are going, east or west, all the way to the Pacific Coast. In fact, around the world.

Q. In other words, the Albany–Buffalo rate is the key to the eastern rate situation? A. Albany–Buffalo is the key to the New England situation and the New York–Buffalo is the key to the balance of the country.

Q. And if the rates remain as they are interstate will that inevitably affect the intrastate rate as a matter of competition? A. Yes.

Q. Will it bring it down or leave it alone? A. Bring it down.

Q. To the level of the state rate? A. To the level, at least, of the combination and to the state rate, I should say.

Q. I interrupted you. Go on. A. We will take from Philadelphia to Albany. The interstate rate is $8.37; on a combination over New York, $7.51; a difference of 85 cents. That means everything south of New York is 85 cents, as far as Albany is concerned. Albany to Montreal $9.04; com-

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476 bination $7.89; difference $1.15. The Delaware & Hudson tell me that that rate is being manipulated very considerably. In other words, passengers are buying to Rouses Point and repurchasing.

Q. Take the Ontario & Western Railroad, running into New York, interstate to Cornwall and
477 intrastate from Cornwall to the west side of the river? A. Take New York to Oswego, the Ontario & Western rate is $11.75, whereas the combination over Cornwall makes it $10.11, a difference of $1.64.

Q. Do you or not know whether the Ontario & Western is to-day selling any through tickets
478 between Oswego & New York? A. We are advised they are practically selling no through tickets, but passengers are taking advantage of this Cornwall combination.

Q. (By Exam. LaRoe) Is there a break in the service of Cornwall, or does the passenger have
479 to leave the train? A. I understand they buy their tickets to Cornwall and pay their fare on the train. All trains stop at Cornwall.

Mr. Andrus: Passengers have ample time to get tickets leaving the Ontario & Western. I desire to state that is being done largely by local passengers — not only confined to through pas-
480 sengers, but local passengers from Cornwall north are to a considerable extent availing themselves of that situation.

The Witness: You see, Mr. Examiner, as the distance increases the spread becomes wider, and the example I gave you on Oswego was a long distance point.

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Q. (By Mr. Paulding) Have you any knowledge as to whether the Long Island is to-day selling any interstate tickets? A. I understand substantially none at all. In other words, passengers are buying to New York and repurchasing. 481

Q. So the condition is a practicable and not a theoretical one? A. A very serious one.

482

Cross-Examination:

Q. (By Mr. Clark) May I ask you whether the Long Island ever did sell any interstate tickets in any amount? A. The Long Island, as you are aware, covers a very large section of this state, and they do a very considerable interstate business. Relatively, they do as large a business as 483 other lines similarly situated.

Q. Do you know how much they took in in interstate tickets in any year? A. No.

Q. Do you know whether they took in a considerable amount? A. I do not know, but I understood Mr. Porter—

484

Mr. Paulding: During the year 1919 it was over one million dollars interstate passenger business.

The Witness: That is on the record here. I understood Mr. Porter to say about one million dollars.

Q. (By Mr. Clark) Have they ever done that before? Do you know? Have you got the figures before 1919? 485

Exam. LaRoe: I would like to have the record show for the last two or three years exactly what the Long Island interstate traffic amounted to.

Mr. Paulding: That will be done.

Re-direct examination:

Q. (By Mr. Paulding) In the matter of commutation tickets, have you anything to say as to that? A. With respect to commutation fares which were also advanced twenty per cent interstate under the authority of the Commission, similar conditions exist as in connection with one way passenger fares, with the result that taking for illustrative purposes in New York, New Jersey, Connecticut suburban districts, commuters living in New York State are traveling at the old fares, while the commuters residing in New Jersey and Connecticut are paying the increased commutation fares, the former being intrastate, while the latter are interstate, and all of these commuters are doing business in the city of New York. Mr. Examiner, further touching upon the commutation situation, as also in connection with the one way passenger fares, where illustration was given as between the New York Central and the West Shore Railroad between New York and Albany, there are in effect commutation fares as far north as Poughkeepsie on both lines, which prior to August 26, 1920, between common points connected by ferries, were the same, and the tickets were honored optionally on either road, but in view of the increase not having been approved by the Public Service Commission, it results in the situation under which the commutation fares of the New York Central Railroad remain unchanged, while the West Shore Railroad fares on account of being interstate have been advanced, and if the interchangeable arrangement is continued, passengers will naturally buy New York

Central commutation tickets in order to obtain advantages of the lower fares, which in turn has the effect of defeating the fares of the West Shore Railroad. 491

Q. (By Examiner LaRoe) What is the territorial region involved there? A. New York is a terminal. 492

Q. Where does this commutation traffic come from? A. Well, it comes from the outlying districts here, New Jersey, Connecticut and New York. Now, the New York Central and the West Shore are parallel with the Hudson river here and they have a commutation fabric rate that extends as far north as Poughkeepsie. Now, on 493 either side of the river there are important stations, and the commutation rates from these stations to New York are the same, and in the past the tickets over either road have been good.

Q. Well, Poughkeepsie is not on both sides of the river, is it? A. No, but I said connected by ferry. 494

Q. And the commuter could go from Poughkeepsie to New York by crossing the river to the West Shore by ferry and then coming down on the west side of the river? A. Yes, optionally, or the West Shore passenger could cross the river and come down on the New York Central.

Q. What would be the object of the Poughkeep- 495 sie passenger in crossing the river and coming down on the West Shore? A. On account of more accommodating train service at times, and vice versa — gives the maximum service at the same rate. Now, manifestly if the West Shore rates

496 are increased 20 per cent, and this point that is optional, Poughkeepsie — the optional arrangement is continued — the passengers will buy New York Central tickets.

Q. (By Mr. Paulding) Is there a situation where any roads running in or out of the city
497 and state, has commutation rates, both interstate and intrastate on the same train? A. Yes, sir; a similar condition also exists as to commutation fares on the New York, New Haven & Hartford Railroad, as outlined in connection with one way passenger fares, in that a commuter, traveling on the New Haven trains to Portchester, N. Y., and
498 located in the same seat with another commuter from New York to Greenwich, Conn., the next station beyond, the passenger to Portchester is traveling on a commutation ticket on the basis of the old fare, while the other passenger to Greenwich is paying the 20 per cent increase.

499 Q. (By Exam. LaRoe) What is the difference in amount? Do you have the figures? How much would that amount to on a monthly ticket? A. The Portchester fare is $10.89 and the Greenwich, Conn., fare $13.47.

Q. By Mr. Paulding) And the distance between the two? A. Only 2.4 miles distance.

500 Q. And that applies as far east as New Haven, does it not? A. Yes, sir; the suburban zone of the New Haven line extends as far east as New Haven.

Q. Now, as to the surcharge upon Pullman space, will you state what the effect of that is as

to passengers in the state of New York and passengers interstate? A. The Interstate Commerce Commission authorized a surcharge for space occupied by passengers traveling in parlor and sleeping cars on the basis of 50 per cent of the Pullman rate, but the Public Service Commission did not approve it and hence taking the New York-Buffalo situation for illustrative purposes, a passenger occupying a lower berth in a sleeping car over the New York Central Railroad, does not pay the surcharge of $1.25, while such surcharge collection is made from passengers traveling over the other lines between the same points, and which has the effect of further widening the disparity between the cost of the trip where a sleeping car is used by the other lines operating between the same points. There are through passengers destined to or from points west of Buffalo, as for example, Chicago, who only purchase their sleeping car accommodations as far as Buffalo, on account of the surcharge not being made there. The New York Central Railroad in New York state, it extends no equal conditions under which passengers may journey that way at less cost than passengers traveling in sleeping cars over the other lines operating between New York and Chicago. I have figured the entire situation here, taking the difference in the passenger fare surcharge and war tax, and I find that between New York and Buffalo the total for the New York Central is $16.91, and for all the other lines $19.46; or, in other words, taking into account the difference in the lower rate of the New York Central and the addition of the surcharge a pas-

506 senger is enabled to travel from New York to Buffalo in a lower berth in a sleeping car for $2.55 less than by all the other lines operating between those points, and the same comparison on Chicago, assuming that the passenger travels west of Buffalo in a coach. In other words, only in a sleeping car between New York and Buffalo, 507 $2.11.

Q. Now, going back for a moment, Mr. Hunter, to the competitive situation in New York with these different railroads, how many roads reach Syracuse, for instance, from the city of New York? A. There are three lines, New York Central, West Shore and Delaware, Lackawanna & 508 Western.

Q. Two interstate and one intrastate? A. The intrastate and the two latter interstate.

Q. And Rochester? A. There are four lines, one of which, the New York Central, is intrastate, while the other three lines, the West Shore, the Erie and Lehigh Valley are interstate.

509 Q. At Ogdensburgh there is a similar situation, is there not? A. Yes; I think I have Ogdensburg here. The same situation — similar situation.

Q. (By Exam. LaRoe) Do the Lehigh Valley and Lackawanna have a heavy passenger traffic from New York to Buffalo? A. Yes, sir.

510 Q. The Lehigh Valley runs the Black Diamond Express? A. Yes.

Q. And a number of other special trains? A. Well, they have accommodating service between New York and Buffalo. Of course, they do not operate anything like the service of the New

York Central. The Lackawanna has trains between New York and Buffalo. 511

Q. How about the Erie? A. The Erie as well.

Q. Reverting to this subject of commutation fares, there is a very heavy commutation traffic into the city of New York from almost all directions? A. Yes.

Q. That comes, part of it from New Jersey, part from Long Island, part from Connecticut, part from New York. A. Yes, sir. 512

Q. Has the 20 per cent been applied already to all commutation business to New York except that originating in the state of New York? A. Yes, sir, effective August 26, 1920.

Q. Approximately what percentage, just as a rough estimate, of the total commutation business into New York has had the 20 per cent imposed upon it? That would include, of course, Connecticut and New Jersey? A. I haven't those figures, Mr. Examiner, but will be very glad to supply them for the record. 513

Q. Well, New Jersey commutation traffic into New York is very heavy, is it not? A. Very, yes, sir. 514

Mr. Clark: I think the Long Island is the heaviest.

Mr. Taylor: Mr. Examiner, I would like to call your attention to one point. That is there are some points in New York state from which the commutation traffic to New York is through the state of New Jersey. Some of them are quite substantial as commutation points, and yet they are so located as to be adjacent to stations which have 515

516 the intrastate commutation service to New York City. For example, Nyack on the Northern Railroad of New Jersey, operated by the Erie, is connected by ferry with Tarrytown on the New York Central, and the service from Nyack is largely suburban service, while the Erie to New York
517 is interstate. The service from Tarrytown to New York over the New York Central is intrastate. There are other places similarly situated.

The Witness: It is very true of the West Shore Railroad. They have a very heavy suburban commuting business.

Exam. LaRoe: Is there any way the Nyack
518 passengers can defeat the interstate fare?

Mr. Taylor: They can cross by ferry to Tarrytown, landing near the New York Central station in Tarrytown.

Exam. LaRoe: Do you know whether that is done or not?

519 Mr. Taylor: I do not know. It has hardly been in effect long enough.

Q. (By Mr. Paulding) Following those questions as to commutation tickets, Mr. Hunter, can you state from your experience as to whether there is competition between the stations in the
520 commuting zones in New York, Connecticut and New Jersey, the localities endeavoring to obtain more business or more inhabitants by reason of railroad rates? A. Yes, sir.

Q. What have you to say as to that? A. Well, I will say with respect to commutation business,

there is competition to the extent that those residing in one locality are interested to the extent that they want to have rates that are reasonably fair to them as in contrast with persons living in other localities, similarly situated. 521

Q. I want to know whether or not the fact that lower competitive rates are given to one locality in one part of the country and another locality in another part, both going to a common point for business has any effect on making people live in one place or the other? A. I think that that would naturally have a very considerable effect. For instance, a passenger who lives in New Jersey today and formerly had a commutation rate of $10, is now paying $12, whereas the commuter who is more fortunately situated and living in the state of New York is still paying $10. Now, that necessarily has an influence on other persons who are thinking of going out of the city to live and locating where the rate is the cheapest. I should say to that extent there is real competition on commutation traffic as between localities. 522 523 524

Q. It is only incidental, but the question of war tax means a great deal, does it not, in these matters? A. Yes, sir; the United States Government is an interested party in that relation.

Mr. Hale: Any more than to get all they can?

Mr. Paulding: That is a good deal for the Government now-a-days. 525

Mr. Hale: The higher the rate, the higher the taxes.

The Witness: That is what we are working for.

526 Mr. Paulding: I think that is all I have to ask.

Mr. Hale: I want to ask just one or two fundamental questions.

Mr. Griffin: I would like to ask the witness a couple of questions.

527 Exam. LaRoe: Yes.

Re-cross examination:

Q. (By Mr. Hale) This loss of interstate business by a passenger buying a ticket to Buffalo when a train is broken is largely speculative, is it not? A. Yes, it is largely speculative, but with
528 our general knowledge of the ways among passengers who are experienced we know beyond peradventure of a doubt that as this thing becomes more pronounced, a large number of passengers will naturally take advantage of it; particularly those engaged in commercial pursuits and that travel constantly, and here again comes
529 the situation which railroads do not like to be placed in, nor would we think that the state authorities would want to have the passenger who knows the ways and means of getting the advantage by the combination process, be in a more favorable position than his neighbor who knows not of it.

530 Q. Well, then, it follows that you are able to estimate what percentage of the interstate business passing through Buffalo in all directions will take advantage of the opportunity to get off the train and buy a state rate ticket? A. I cannot say that for the reason that the new interstate fares —

Q. Are you able to say it or not — what the percentage will be? A. Absolutely not. 631

Q. Are you able to estimate the percentage will be around 5 per cent of interstate passengers who do this? A. I am not prepared to state any percentage.

Q. Would you place it as high as 95 per cent? A. I would not. 532

Q. Would you place it as low as 1 per cent? A. I would not.

Q. The bulk of the interstate passenger business to Buffalo will be by Pullman sleeper, chair car, club car, etc. A. Are you speaking with respect to New York, now?

Q. Well, would you say that into the State of New York through Buffalo, will the bulk of interstate business be by special car of some kind? A. It all depends on the length of the haul, I should say. 533

Q. Taking all of the business together, will the bulk of the business be by Pullman? A. I should say long haul business, a large proportion of it will be by Pullman, but I should say the greater proportion of it would be in coaches. I think all of the through travel would be in Pullman service — that is a great proportion of it. It all depends, as I say, upon the length of the haul, which would determine as to the kind of equipment that the passenger would travel in. 534 535

Q. It follows it would be more difficult for a Pullman passenger who has got his ticket through to accommodate himself by stopping off and buying another ticket, does it not? A. Well, there is a certain amount of inconvenience about it, per-

536 haps, but then the fellow who wants to save the money will suffer that inconvenience.

Q. Well, the Pullman and railroad conductors together can check that pretty well? A. They can endeavor to check it, but I think that they will fail in a great many cases.

537 Q. But to a large extent they can check it? A. We hope that they can.

Q. The difficulty would probably be mostly on short hauls into this state on coach traffic, is that so? A. There would be a very large traffic.

Q. But of course the loss in revenue on short hauls would be much less, naturally, than it would 538 be on the long Pullman hauls? A. Then you are speaking of the relation of the density of the traffic conditions.

Q. Well, that is apparent of course on the face of it. The man coming through from Chicago to New York who splits his ticket at Buffalo, the loss in revenue to the railroad is much greater than it would if he was going a few miles beyond 539 Buffalo from a few miles outside the state? A. Yes, but on the other hand the traffic between the shorter points might be more dense and in the aggregate it might exceed the through.

Q. But you know, of course, that there is really no commuting from outside of the state of New York through Buffalo to points beyond Buffalo 540 that amounts to anything? A. What do you mean by commuting?

Q. Well, people who come in daily to their work. A. Well, in the Buffalo district, of course, the commutation traffic is comparatively small when compared with New York.

Q. If there is any commutation traffic it is into the city of Buffalo and not to any points beyond there? A. Yes. 541

By Mr. Griffin:

Q. Buffalo and Albany are ports, Buffalo on Lake Erie and Albany on the Hudson river, about 330 miles apart? A. Well, from a passenger standpoint we regard Buffalo as a port in connection with any business we might have over the lakes. 542

Q. Well, Albany is a port, in that you may connect with day boats and night boats running between Albany and — A. Yes, sir; we have freight rates that way. 543

Q. And the two cent fare for way passengers to and from the ports of Buffalo and Albany on the New York Central Railroad, is an advantage that the people of this state have long enjoyed, is it not? A. I think they have, yes, sir.

Q. And if the two cent state rate is raised to the level of the interstate rate that advantage will be destroyed, will it not? A. Well, it will not exist any more. If I may comment on that — 544

Q. I would rather you would not. A. All right.

By Mr. Hale:

Q. Mr. Hunter, I would like just two or three things that I think are fundamental, but I would like to have the record show. How many competitive routes between New York and Chicago for passenger traffic? A. How many? 545

Q. Yes. A. Do you want me to enumerate the lines?

546 Q. I would like to have you. A. All right, the New York Central, West Shore, New York, Ontario & Western, Erie, Delaware, Lackawanna & Western, Lehigh Valley, Pennsylvania, Baltimore & Ohio — eight lines.

Q. Now, the New York Central, goes up north as far as Albany, then west to Buffalo and around
547 Lake Erie by the Lake Shore and Michigan Central, and the most southern route is the Balti more & Ohio? A. Yes.

Q. Does that go through Washington? A. Yes.

Q. The Pennsylvania is the short line of all? A. Yes, sir.

Q. And the through rate of all of these rail-
548 roads is found by multiplying the mileage of the Pennsylvania by 3.6? A. Substantially so, Judge, but I would like to get this clear upon the record just how the rate is made to-day.

Q. Very well. A. The short line from New York to Chicago is via the Pennsylvania Railroad, distance 906 and a fraction miles. It makes
549 three cents a mile, as established by the Railroad Administration $27.22. To that, under the authority of the Interstate Commerce Commission in Ex Parte 74, 20 per cent was added, so that that has the effect of establishing the present interstate rate between New York and Chicago of $32.67.

550 Q. Well, that really if you divide $32.67 by the number of miles you get the quotient of 3.6? A. Substantially I should say. I have not tried it.

Q. Well, that is the basis. A. That is the basis.

Q. If there is any difference, it is one of fractional and not of consequential moment? A. Yes.

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Q. That makes the rate, therefore, 3.6, less than that on every competing line? A. Yes, sir. 551

Q. Which is the longest road, Baltimore & Ohio or New York Central? A. I could not say offhand. The New York Central is not the longest line. I should imagine perhaps the Baltimore & Ohio.

Q. Have you any idea what the Baltimore & Ohio gets per mile on that same rate? A. No, I have not precisely, but we could figure it out. 552

Q. It is a question of computation, is it not? A. A question of computation, yes, sir.

Q. In other words, there is only one carrier between here and Chicago that is going to receive net 3.6 per mile? A. Yes. 553

Q. And yet you propose to make — I say you propose — I assume you identify yourself with the New York Central and these other petitioners here. You propose to make every local passenger in the State of New York pay a greater rate for his ride from one point to another than you receive on the through route or any of these others except the Pennsylvania? In other words, that the rate fixed by the Pennsylvania by reason of competitive conditions, between New York and Chicago is to determine every local rate in the State of New York, and determine it at a higher figure than between New York and Chicago? A. Well, Judge, of course, I could not subscribe to that proposition. 554 555

Q. You think I am arguing the case. A. Because it is competitive.

Q. Is not that the fact, beneath it all, that only one carrier — that the whole business is deter-

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556 mined by competitive conditions, so far as the New York-Chicago rates are concerned; that you cannot allow any one road to charge or make the others charge the same rates precisely; if they did, one road would get all the traffic — is that the idea — the short road? A. Well, the Railroad Administration, I might say, prior to Federal control, the
557 rates between New York and Chicago were not alike by all lines. They were alike by the New York Central and the Pennsylvania, and the other lines were known as differential lines and a like rate obtained. The Railroad Administration decided that the rate should be alike by all lines.
558 In other words, that the basic rate of three cents per mile should be the establishing factor in making the rate. They, therefore, established like rates on all lines between New York and Chicago, made on the short mileage on the Pennsylvania. Now, in approaching the equalization of fares, the long prevailing custom and practice that had been in effect throughout the country
559 was taken into consideration. In other words, the fares between New York and Chicago, being great commercial centers, it was felt that they should be alike in order to accommodate the enormous travel between those two points, by giving the passengers the maximum train facilities between those two points; and that was true of a
560 great many other commercial centers, like between New York and Pittsburg, New York and Washington, and New York and St. Louis. Entirely aside from the competitive conditions, as you are trying to represent as between the carriers themselves, my own view is that while the

carriers were naturally concerned as between themselves, from a competitive standpoint, it is not one-sided, in that the traveling public were benefited to the extent that the carriers have not taken the full advantage of the 3.6 cents per mile, so that the passengers on the long haul got the advantage of the common rates and with the maximum train service. 561 562

Q. I understand you are making here for a rate of 3.6 cents per mile on all local tickets between any two points, between stations on the New York Central, including Albany and Buffalo? A. Yes, sir.

Q. The real foundation for your asking for that is the fact that the rate from Chicago to New York is determined by the mileage of the Pennsylvania? A. No, sir, absolutely not. 563

Q. Why should the rate between Schenectady and Utica, for illustration, or Utica and Syracuse, or any other two stations ten miles apart, depend remotely on a fare which must be fixed by competitive conditions existing between Chicago and New York, by reason of these various routes? A. Judge, we are not attempting to rest our case on the New York-Chicago situation. As I understand it, we are simply trying to explain the facts in the case — what the result would be if the rate fabric in the State of New York stands where it is today. 564

Q. I suppose there are no two roads to Buffalo — that is the Lehigh, the Lackawanna, the Erie and the New York Central all have different mileages? A. Yes. 565

Q. That rate is determined by the road with

566 the least mileage? A. The Lackawanna Railroad.

Q. So you take a passenger who rides over your road from Albany to Buffalo — you take a less rate per mile than the Lackawanna receives? A. That is true, but again I say, if there is any disadvantage in that, it is against the carrier and not the public.

567 Q. There is no exception in your prayer for relief, or what you desire to accomplish by this proceeding or any similar proceeding — no exception in favor of local fares at any less than 3.6? A. No, sir.

Q. Without any regard to what local conditions may be? A. No, we think, Judge, that the rate

568 fabric of the country, both intrastate and interstate ought to be on a uniform basis, in order to eliminate all discriminations as between persons and localities. You cannot do it otherwise. There is no reason in the world why the people of the State of New York should be in a preferred class against those who live in the State of Pennsyl-

569 vania.

Q. Is there any reason why people who want to travel locally between short distance points should pay a higher rate for their passage than a road like the New York Central or the Baltimore & Ohio is going to get out of this rate structure, because confessedly they are going to get less

570 than 3.6 cents per mile? A. I don't follow you, Judge, on that line of argument.

Q. (By Mr. Paulding) Mr. Hunter, what Judge Hale has asked you concerning the Chicago rate, made over Pittsburg and adopted by the lines having a longer mileage than the Pennsylvania,

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illustrates what you have said as to the necessity of roads having a right, if you please, to charge a higher rate of fare, being compelled to meet this through rate of the road having a lower rate of fare. Is that not a fact? A. That is a fact. 571

Q. If the intrastate rate governs the low rate of fare made by that road, the other roads must reduce their fixed rate to meet that condition, is that not a fact? A. Yes, sir. 572

Q. (By Mr. Clark) There is not any case on the Long Island Railroad where the Long Island Railroad train goes out of the State of New York, is there? A. No, I do not so understand there is.

Q. You don't understand that there is? A. No, sir. 573

Q. And there isn't any other railroad that runs a train — a passenger train — to a station on the Long Island, from outside the State of New York? A. No, sir.

Q. Do you know whether the New York Central Railroad sells tickets or publishes tariffs of fare to points on Long Island? A. What line? 574

Q. The New York Central. A. They do.

Q. And all the other interstate roads? A. Yes, sir.

Q. To what stations do they sell those tickets, do you know — all stations on Long Island? A. They carry in their tariff the principal points, and they will sell a ticket to any point not carried or 575 from any point.

Q. And the Long Island sells to any point on any other railroad, you understand? A. Yes, sir.

Q. Are you familiar with the Long Island

576 traffic? Have you ever lived in Long Island? A. No, I have not lived there, but I have been to Long Island several times.

Q. Have you made a study of it to some extent? A. No — in what respect?

Q. Well, do you think there is a general move-
577 ment from any point in Long Island to any point without the State of New York? Is there a line of travel from any point on Long Island to any point outside the State of New York? A. Well, I cannot speak definitely upon that point, but I know that there are a great many residents on Long Island, and I have to assume that they
578 travel the same as people living in other parts of the country, and relatively to the number living there, I should imagine they would travel substantially the same as those living in other sections, on interstate journeys.

Q. As a matter of fact, Long Island is merely a residential section of the state, is it not? A.
579 Residential?

Q. Yes. A. I should say it is residential, just the same as New York City.

Q. No large cities on Long Island with the exception of Brooklyn — is that not so? A. There is no other city on Long Island that will compare with it, I should say.

Q. Well, no city on Long Island except Brook-
580 lyn that would compare with Buffalo or Albany? A. No.

Q. Or any of the other cities which you have been talking about? A. None of these larger cities, no.

Q. Now, do I understand you, it is the purpose

of this application to increase all single and round-trip tickets to 3.6 cents per mile? A. No, sir; the proposition here is to increase the fares that were in effect prior to August 26, 1920, 20 per cent. We are simply stating this comparison between 3 and 3.6 for illustrative purposes. The application is to increase the fares as they existed on August 26, 1920, 20 per cent. 581

Q. You know, do you not, that the Pennsylvania Railroad, the New York, New Haven & Hartford and the New York, Westchester & Boston all have local rates considerably under 3 cents per mile? A. The 20 per cent would apply to these rates. It was not the intention to put them on a 3 cents per mile basis. 582

Q. If they were left at that rate, which would still leave them below 2 cents a mile, it would be a penalization against Long Island points which had 3 cents, would it not? A. In connection with comparisons, insidious and otherwise that may be drawn, and between rates in different sections, I would like to get into your mind the thought that the Interstate Commerce Commission, in granting this advance generally to the carriers, because of conditions with which you are entirely familiar, stated that manifestly they could not go into all of the then existing relationships as between fares, either freight or passenger fares, but if there were any situation where it might be thought that attention should be given to the consideration of them upon merit, those cases might be presented later and so considered; so that in this matter we are not coming here and asking or seeking out any particular rates or kind of rates or fares, as to whether they may be com- 583 584 585

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paratively one with the other. In other words, this is a revenue producing measure. It does not run, as I understand it, to the question of maximum rates or minimum rates or anything else.

Q. Regardless of the justice of the present rates, you want the 20 per cent increase? A. Yes,
587 that is the idea. I do not understand that question is in issue at all. At least that has been my understanding.

Q. Have you any record of what was the amount of money paid into your road for interstate tickets to points on Long Island in the last three years, or any other railroad? A. You under-
588 stand I don't represent any particular railroad. I am connected with an association, and I think Mr. Paulding will be very glad to furnish you any statistics you want.

Q. Could they be secured?

Mr. Paulding: I think so, Mr. Clark.

589 Mr. Gardner: I understood that was to be secured.

Q. (By Mr. Clark) The first question was raised as to tickets sold on the Long Island. I want to find out how many tickets were sold on other roads to points on the Long Island. A. That is, you want the information in both directions?

590 Q. Yes; unless it will be conceded that it is practically negligible.

Q. (By Mr. Victory) Do you know whether or not a passenger can buy a ticket at the New York Central office, say at Albany and ride through to Jamaica, in the County of Queens? A. He could, yes.

591 Q. Over the Long Island Railroad? A. Yes; and have his baggage checked through, too.

Q. Could he buy a passenger ticket? A. Yes, absolutely.

Q. When did that practice go into effect? A. That practice has been in effect for a great many years, has it not, Mr. Woodward?

592 Mr. Woodward: It has been in effect ten years, anyhow.

Q. (By Mr. Victory) And you can buy at Jamaica, Long Island, a through ticket to Albany? A. Any place in the country.

Q. That is in practice to-day? A. Yes, sir.

593 Q. (By Mr. Paulding) Of any other place in the United States? A. I might say for your information that the Long Island Railroad has on file with the Interstate Commerce Commission the basing and interstate basing tariff which they use in selling tickets from points on their line to any point in the United States.

594 Q. (By Mr. Clark.) Is there any way that we could form an opinion on the amount of tickets sold on other roads to points on the Long Island? A. We could call upon the lines to furnish that information.

595 Exam. LaRoe: I am afraid that would be difficult to get in the eastbound direction.

The Witness: I do not mean all the railroads in the country.

Q. (By Mr. Victory.) May I ask if the agent that sells that ticket is not the agent of the Long

596 Island Railroad Company or is not the agent of the New York Central? A. He is the agent of the Long Island railroad, selling a ticket from Jamaica to a point on the Baltimore and Ohio, or wherever the passenger desires to travel. He sells what is known as an inter-line ticket, read-
597 ing from a point on the Long Island railroad to the other lines.

Mr. Bikle: Mr. Examiner, is not the information you requested a little while ago substantially what these gentlemen are asking? That is the passenger revenues of the Long Island, derived from the interstate traffic, so that would cover it
598 both ways and that is readily available?

Exam. LaRoe: Please show in the same connection what the total passenger revenue of the Long Island is, so we can have a basis of comparison.

Q. (By Mr. Victory.) There is no line compet-
599 ing with the Long Island railroad on Long Island? A. No.

Q. (By Exam. LaRoe.) That is not strictly true, is it? I thought there were several subways that were in competition with the Long Island railroad. A. Steam roads, say for instance, beyond Jamaica up to Jamaica, there are surface
600 lines and elevated lines that operate to within the city of New York.

Q. You said something about the history of fares and I am interested in that phase of the matter. Was there a time within the last ten or fifteen years when there was a general two cents

per mile basis of passenger fares in this territory? How far back did the two-cent basis apply? A. There has not been any two-cent rate. 601

Q. Then it was 2½ cents, was it? A. It was 2½ cents; in the early days is was three cents a mile, but there was some agitation in some of the states for a two-cent rate. For instance, in this State. The bill was vetoed by Governor 602 Hughes and left to the determination of the reasonableness of the rates in the hands of the Public Service Commission. Then there was an attempt in the State of Pennsylvania to put in effect a two-cent law and it was declared unconstitutional by the Supreme Court of that State, and rates have been established generally in this 603 eastern territory, interstate of 2½ cents a mile. The only exception to that was I think on the New York Central between Albany and Buffalo.

Q. Approximately, when did the 2½ cent basis take effect? A. I think it was in 1916, was it not?

Q. You say prior to that, the basis was higher than 2½ cents. A. Yes. 604

Q. And generally on a three-cent level? A. Yes.

Q. What was the territorial extent of that three-cent fare that was in existence prior to 1916? A. Well, it covered, you might say, the Trunk Line territory.

Q. Did it cover Central Freight Association 605 territory, also? A. Personally, I think it was pretty well on a three-cent basis until the states came along and established the rates on two cents a mile, but the interstate bases were generally on 2½ cents a mile.

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Q. Is it fair to say that prior to 1916, the fares both State and interstate in Trunk Line and New England were on a basis of three cents a mile? A. Within the State?

Q. Both State and interstate rates. Get that straight, now. Prior to 1916, as I understood
607 your answer, the State and interstate fares in New York, Vermont and New Jersey, as well as Pennsylvania — most, if not all of New England and Trunk Line territory — were on the basis of three cents a mile; is that correct? A. Well, generally, they were on a three cents a mile basis, but there were exceptions. For instance, any between Albany and Buffalo, the rate was two
608 cents a mile — had been in effect for years. The rate between New York and Buffalo was made over Albany; that established a lower rate than three cents a mile, whereas the rate from New York to Washington and Philadelphia was three cents.

Q. In 1916 the 2½-cent basis became effective
609 on interstate traffic? A. And also largely in the states, except where as in the central states, the statute fixed the maximum of two-cent fare laws.

Q. Is it a correct statement to say that in 1916 a basis of 2½ cents became effective on passenger tariffs, except where provided by State statute? A. Yes, sir.

610 Q. There are no important interstate exceptions to that basis that you know of? A. No, sir.

Q. And that applies to all of the eastern territory, including trunk line and New England? A. Yes, sir; I am going to confirm that particular year, Mr. Examiner.

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611 Q. Yes, I wish you would. Now, that 2½-cent basis established in 1916, continued in effect until General Order 28 of the Director-General of Railroads? A. Yes, sir.

Q. When the fare became three cents? A. Yes, sir.

Q. And that applied, both State and interstate, 612 throughout all the territory we have been talking about, regardless of State laws? A. Yes, sir.

Q. And that continued in effect until August 26th of this year? A. Yes, sir.

Q. What is the prevailing fare level in the states surrounding New York? A. Well, in all of New England, Pennsylvania, New Jersey, Delaware, Maryland and Virginia, 3 cents a mile. 613

Q. That is, they are now 3.6 cents? A. I mean 3.6 cents on the interstate basis.

Q. That is to say both State and interstate in those states, the basis is now 3.6 cents? A. Yes, sir.

Q. Is that true also of Ohio? A. No, sir.

Q. What is the basis in Ohio? A. It is still 3 614 cents a mile.

Q. By virtue of State laws? A. Yes.

Q. The situation in Ohio then is similar to what it is in New York? A. Yes, sir, and in Illinois too, you covered this morning.

Q. How long have the New York State rates — intrastate rates been on the same general basis 615 as the interstate rates, with the exception of that haul between Albany and Buffalo? A. Substantially always as I understand it, prior to June 10, 1918.

Q. Can you say that confidently for the period

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with which you have been connected with the association? A. Yes, sir.

Exam. LaRoe: Mr. Paulding, I wonder if you could furnish for the record a copy of the order of the New York Public Service Commission with regard to freight rates. I have never seen
617 it.

Mr. Hale: I have them here, Mr. Examiner, and thought I would offer them. I will offer them now.

Exam. LaRoe: Thank you very much.

Mr. Hale: I think they constitute all of the
618 orders that the Commission has made, but if I find to the contrary I will inform you. There are proof sheets of two opinions that were not printed when I left.

Exam. LaRoe: Now, this No. 526, relates to what, the freight or passenger?

619 Mr. Hale: I cannot tell by number. There are two special orders here.

Exam. LaRoe: Mr. Reporter, will you mark as Exhibit No. 3, the opinion headed No. 526, and as No. 4 the one marked No. 527; as No. 5, the one marked, "Special Commission Order No. 7363"; No. 6, the opinion dated August 24, 1920; No. 7,
620 the one dated August 19th; No. 8, the one entitled "Granting Special Permission, No. 7363," dated August 26th.

(The papers referred to were thereupon received in evidence, marked, "Complainant's Exhibits Nos. 3, 4, 5, 6, 7, and 8, Witness Hunter," and are forwarded herewith.)

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621 Mr. Hale: In that connection, I would like to make this inquiry; I suppose you would like any statute that we have, but we do not need to offer it in evidence?

Exam. LaRoe: It won't be necessary, but I would like to have it in convenient form.

622 Mr. Hale: I would like to have you take under your consideration our law, section 57 of the Railroad Law, and I will furnish you with our entire railroad law here, and I want to say in connection with that, what Mr. Paulding will not dispute me in saying, and, therefore, equivalent to testimony, I hope, that that rate of two cents a mile 623 for local way passengers, all points between Albany and Buffalo, inclusive, has never been more than two cents a mile in the history of the State, being originally fixed in the act which authorized the consolidation of six or seven short railroads into one railroad, to be then and thereafter known as the New York Central, and that was 624 chapter 76 of the Laws of 1853, which has been continued and carried into the general railroad act, and now a part of the Railroad Law, and these are the vital particulars so far as it now goes.

"This chapter shall not be construed to allow any rate of fare for way passengers greater than 625 2 cents per mile to be charged or taken over the track or tracks of the railroad known as the New York Central Railroad Company."

Now, of course, that does not mean the New York Central Railroad, as it exists today, but it does mean what was then the New York Central Railroad between Albany and Buffalo.

626 Exam. LaRoe: What does the expression "way passengers" mean in there?

Mr. Hale: I assume that anyone who gets on at Albany, for example, and goes to Buffalo, or any station east of Buffalo like Schenectady or Rochester.

627 Exam. LaRoe: Suppose he gets on at Syracuse to go to Troy, is he a way passenger then?

Mr. Hale: He is, because Troy is part of the New York Central Railroad as originally consolidated.

628 Exam. LaRoe: Suppose he gets on at Troy to go to Poughkeepsie?

Mr. Hale: No, he is not a passenger on the New York Central. He is on another line. The New York Central is as meant by that term in this statute — it has two eastern termini, one at Troy and one at Albany. They converge at Schenec-
629 tady. They separate again at Syracuse, one going by the old road as it is called, and one by direct line to Rochester, and then they go on, one to Niagara Falls and one goes to Buffalo.

Exam. LaRoe: Mr. Paulding, will you have a witness to testify as to transportation conditions, or have you not contemplated that?

630 Mr. Paulding: No, I have not, but I can very easily furnish one. I have all sorts of experts here.

Exam. LaRoe: I think we had better have the Railroad Law of New York marked Exhibit No. 9.

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(The paper was thereupon received in evidence, marked, "Complainant's Exhibit No. 9, Witness Hunter," and is forwarded herewith.)

Mr. Hale: In that connection, would you like the Public Service Commissions Law?

Exam. LaRoe: Yes; we will mark that Exhibit No. 10.

(The paper thereupon received in evidence, marked, "Complainant's Exhibit No. 10, Witness Hunter," and is forwarded herewith.)

Mr. Holmes: Before you adjourn, Mr. Examiner, I would like to enter an appearance, Hugh A. Holmes, representing the American Manufacturers' Association.

Exam. La Roe: We will take a recess until 2:15 o'clock.

(Whereupon, at 12:30 p. m., a recess was taken until 2:15 o'clock p. m.)

AFTER RECESS—2:15 P. M.

Exam. LaRoe: Will you proceed, Mr. Paulding?

Mr. Paulding: I will call Mr. Vosburgh.

L. F. VOSBURGH was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct-examination:

Q. (By Mr. Paulding). What is your position? A. Traffic manager of the New York Central Railroad.

636 Q. How long have you been connected with the New York Central Railroad? A. About 28 years.

Q. What capacities? A. Starting in as a ticket seller, and acting in the capacity of city passenger agent, general western passenger agent, general eastern passenger agent, assistant general pas-
637 senger agent, general passenger agent and passenger traffic manager.

Q. As general eastern passenger agent, you were located in New York city, were you not? A. Yes.

Q. And as general passenger agent, you had charge of all passenger traffic over the New York
638 Central? A. Yes.

Q. And located in the city of New York? A. Yes, sir.

Q. With or without particular knowledge of the traffic conditions in the State of New York on the passenger side? A. I did not get that.

Q. Did you have particular knowledge as to
639 passenger conditions in the State of New York? A. Yes, sir.

Q. Some testimony was given this morning as to the different roads running out of New York to common points in the State of New York, intrastate and interstate lines. Are you familiar with the traffic conditions upon each of those roads? A. In a general way, yes, sir.

640 Q. What was it that made it necessary for you to be familiar? A. Principally because there was keen competition between the lines.

Q. Between what points? A. Well, between New York and Buffalo, New York and Rochester, Syracuse, Utica and points west.

641 Q. That is, competition existed all of the time? A. Yes, sir.

Q. Does it exist today? A. Yes, sir.

Q. Well, now, is that competition in service, or as to rates or as to what, Mr. Vosburgh? A. Both service and rates.

642 Q. Is or is not the service rendered by the different roads between the different common points or between New York and points in the State of New York, a similar service or is it otherwise? A. Quite similar.

Q. Will you say in what respects it is similar? A. As to approximate running time, character of equipment, dining car service.

643 Q. And as to number of trains? A. Yes; there is, speaking directly of the service, between New York and Buffalo — there are more trains via the New York Central than via the other lines. A very large percentage of the business, however, is done on night trains, and the service both as to the character of equipment and running time

644 is approximately the same.

Q. Now, take the service over the New York Central Railroad between New York and Buffalo and other intrastate points, and New York and Chicago, Cleveland and other interstate points, will you say in what respect the service is similar or different, as to service between intrastate points and interstate points? A. There is no dif-

645 ference in the character of the service between intrastate or the interstate points.

Q. As to equipment or as to time? A. No material difference, generally speaking. Of course, in the case of the service between New York and Chicago, we have the Twentieth Century Limited.

646 Q. But that is a particular Chicago train? A. That is a particular Chicago train.

Q. But as to other trains, outside of the Century, passengers are taken upon those trains, irrespective of whether they are interstate or intrastate passengers, are they not? A. Yes, sir.

647 Q. And persons going from New York to Cleveland will travel upon the same train, with persons going from New York to Buffalo, especially upon a night train, is that not a fact? A. Yes.

Q. Does that hold good as to the through rides out of New York? A. Yes, sir.

648 Q. Several questions were asked this morning as to the history of the passenger rates in the State of New York. Are you familiar with the history of those rates? A. Yes, sir.

Q. You had personally to do with most of it, did you not? A. So far as our line is concerned, yes.

Q. Won't you give in your own words what the history of that was, going back to say fifteen years ago? A. Well, as the record shows by the
649 testimony this morning, the basis of fare between Albany and Buffalo for way-passengers, by reason of the State statute, has been two cents a mile, or was two cents a mile for a number of years prior to June 10, 1918. The fare between Albany and New York was likewise two cents a mile for a number of years prior to about 1910,
650 when those fares were advanced to a basis of 2.17 cents per mile. The fares on other parts of the line, the northern New York territory, described as the Rome, Watertown and Ogdensburg district, and the Adirondack divisions, and what

might be described as the Pennsylvania division, were the basis of three cents a mile until about 1907, when they were reduced to two and one-half cents per mile. Those fares were in effect under the order of the Director-General, effective in June, 1918, when they were made three cents a mile uniformly. 651

Q. What particular traffic reasons caused the reduction in those fares? A. So far as our line is concerned, I think a very important governing influence was the fact that under the New York State statute we were required to sell a 500 or a 1,000-mile ticket at 2 cents per mile, good for bearer and unlimited, and we found that in the territory where our normal fares were very much in excess of this mileage fare, that a very large percentage of our local business was handled by the use of these mileage tickets, and I think that was one of the compelling influences for reducing the fare at that time. 552 653

Q. You are familiar, are you not, with the situation in New York, as to the rate situation in the eastern district? A. Yes, sir. 654

Q. Just say in your own words what the influence of New York, if any, is upon the rate situation generally? A. You mean New York State?

Q. New York State, yes. A. Because of the importance of the cities of New York and Buffalo, and the service that operates via the Buffalo gateway, the fares in New York State have a very controlling influence on fares generally, as was outlined in some detail by Mr. Hunter this morning. 655

Q. Do you know whether since the 26th of August, this year, there has been any difference in

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656 the traffic between Buffalo, or between New York and Buffalo and Buffalo and New York, as to the different railroads? A. Yes, sir.

Q. What is that difference? A. I know that there has been considerable falling off in the traffic, heretofore handled by the lines other than the New York Central, and it is my opinion that if
657 this difference in fares should continue, with a difference of $2.55 in favor of the New York Central for a passenger in a sleeping car between New York and Buffalo, it will have the effect of diverting practically all of the business of the other lines to the New York Central.

Q. Or is there an alternative to that as to its
658 effect upon the through rate? A. Yes; the alternative would be for the other lines to reduce their fare to the basis of the intrastate fare.

Q. Is the falling off in traffic attributable to the fact that the service on the other lines has deteriorated in any way, either as to time or character of service? A. Not at all, sir. There has
659 been no change.

Mr. Paulding: I think that is all.

Cross-examination:

Q. (By Mr. Hale): Mr. Vosburgh, take the fare via the Lackawanna to Utica. What determines how much that shall be? A. I think that fare
660 today is figured on actual mileage basis.

Q. Of what road? A. Of the various lines. For instance, the fare via the Lackawanna, is figured via the mileage of the Lackawanna.

Q. Are there different rates between New York and Utica? A. Yes, sir.

661 Q. And each road is collecting 3.6 cents that has the right to collect it? A. Yes, sir.

Q. The New York Central is collecting 3 cents? A. Yes, sir; there are a number of those conditions, Judge, that were created during Federal control, that you can realize could not continue permanently under competitive conditions.

662 Q. You had in mind, of course, your own policy. What will be the condition of things, provided this increase should be made, provided, for example, that the New York Central should be required — privileged or required, as the case may be, to charge 3.6 cents? A. Then the State of New York will gain.

663 Q. Within the State of New York for its local traffic? A. In what regard do you mean?

Q. On the total fare, New York to Utica. Wouldn't you have to charge more than the Lackawanna? A. No, sir; I should say the fare would be common.

664 Q. And that would be determined by the road that had the shortest mileage? A. Yes, sir.

Q. Which has the shortest mileage, the Lackawanna? A. No; I think the New York Central.

Q. You think your distance is less than the Lackawanna? A. I think so.

Q. So that the Lackawanna would have to take less than 3.6 cents? A. Yes, sir.

665 Q. Now, that would be the same at Syracuse? A. Precisely.

Q. And Rochester and Buffalo? A. Yes, sir.

Q. So that only one railroad competing for Utica traffic, or Syracuse, or Rochester, or Buffalo traffic between New York and those points, would

666 really receive 3.6 cents; the rest would be receiving a little less? A. Yes, that is true.

Q. Now, why should not the local traffic which hasn't anything to do with New York or Buffalo, or anything to do with Syracuse, Utica or Rochester as competing points — why should that be made on the basis of competitive rates? A. As
667 was covered by Mr. Hunter — I thought he answered that question this morning — we are authorized by the Interstate Commerce Commission to advance our fares 20 per cent, and as he pointed out we did not single out any particular situation. We purpose carrying out that authority and ap-
668 plying that basis throughout the country.

Q. Now, the examiner asked you about the history of these rates. I will ask you just one question in that connection. Has there been any statutory change respecting railroad rates, by the State of New York — local rates — in the last ten years, say, except the enactment of the Public Service Commissions Law itself in 1907; but apart from
669 that, has not the statute been amended which fixes a rate, like the rate between Albany and Buffalo, or the rate generally of 3 cents a mile, which included the Erie, Lackawanna, etc.? A. I don't know as I am competent to answer that, but it is my impression, not.

Q. I think there has not been. I think that might
670 be conceded on the record, so far as fixing a specific rates, there has been no change of the statute, but of course, the Public Service Commissions Law has come on, under which the Public Service Commission has the power, upon showing, to either raise or lower. (No response.)

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Mr. Paulding: Do you think the Ulster and Delaware case goes to that full extent? 671

Mr. Hale: I think it does, if you construe it along with what they hold in the other utilities.

Exam. LaRoe: I take it your Commission has never passed upon the general passenger-fare level? 672

Mr. Hale: Perhaps I ought to let Mr. Paulding, who is more familiar with it, state in regard to an application to raise the rates of the New York Central between Albany and Buffalo to 2½ cents, some years ago.

673 Mr. Paulding: A general application was made, between four and five years ago, by the New York Central Railroad, in connection with the other railroads in the State, to increase passenger rates. It was made, of course, by filing the tariffs, showing the increased rates throughout the State, raising them to the general level of 3 cents a mile. 674 The Public Service Commission suspended those tariffs, and after a very extended and exhaustive investigation into the matter, denied the application and continued the suspension. A long opinion was written by the Commission, the chief reason for it being that the statutory rate of 2 cents per mile for way passengers between Buffalo and Albany, while it was a discriminatory rate against 675 the rest of the State, prevented them from granting a general increase in passenger rates, and, therefore, they were compelled to deny the whole increase.

676 Exam. LaRoe: Was that a state-wide application?

Mr. Paulding: That was a state-wide application.

Exam. LaRoe: What was the date of that ap-
677 plication?

Mr. Paulding: I think that was 1916 — the early part.

Mr. Hale: Of course, that record will speak for itself, and the opinion of the court and the order made. I will furnish that if you would like it.

678 Exam. LaRoe: I think that is sufficiently important to be filed in the record, at least as a matter of history.

Mr. Hale: I never have understood that on that application the Commission held that they had not the power on an application made to increase
679 the 2-cent rate for local passengers between Albany and Buffalo — that they had not the power to do it, but simply that that action was necessary in view of the legislation of the State. I will be glad to furnish the order and the opinion. Now, the record — I do not suppose you would want your record lumbered with it.

680 Exam. LaRoe: No, I think not, just the opinion, if you please.

Mr. Hale: I will do that.

Q. (By Exam. LaRoe) Your testimony with regard to the extent of the 2½ cents fare, when it was in effect, seems to differ slightly from that of the witness this morning. A. Yes, I think so.

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Q. It was not the state-wide fare. As I understood the witness this morning, he said that that fare was pretty general in this state, except for the portion of the line between Buffalo and Albany. That does not conform with your understanding. A. That is generally so, yes. As I stated, the fare between Albany and Buffalo was on the basis of 2 cents.

Q. Where else in the state was not the 2½ cents fare applied? A. Between Albany and New York.

Q. It did not apply there? A. No, where the basis was 2.17.

Q. Yes; you mentioned that. Now, where else? A. That is all, so far as our line is concerned.

Q. How about other lines? A. I think the basis generally was 2½ cents.

Q. The date should be changed then from 1916 to 1907? A. Yes, sir.

Q. Then the 2½ cent fare was in effect from 1907 to 1918? A. That is correct.

Q. Did that apply also to states surrounding the state of New York? A. I think so, yes.

Mr. Hunter: Mr. Examiner, I kept saying 1916 this morning, but I really meant 1906. Since luncheon I confirmed it. It took effect on November 1, 1906.

The Witness: Well, I have not checked the date, but I knew it was either late in 1906 or 1907.

Q. (By Exam. LaRoe) Your line has the heaviest passenger service, I assume, of any line in the State of New York? A. Yes, sir.

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Q. And your line between New York and Buffalo is the heaviest density line in the state? A. Yes, sir.

Q. You said something about different fares to Utica. Do I understand that at the present time there are three or four different fares from New
687 York to Utica? A. I think so.

Q. To what extent is that situation general? A. Well, I should say that it is true more or less, but not general. In establishing the new fares, the Director General authorized different fares via different lines between given points, based in some instances on mileage and other conditions.

688 Mr. Paulding: If I might say there, I have figures here which show that is true as to Utica and Syracuse — between New York and Utica and New York and Syracuse, only.

Exam. LaRoe: That is a rather unusual situation, and one is naturally prompted to inquire
689 why it was not corrected when Federal control terminated.

Q. You have in mind correcting it? A. Oh, yes.

Q. It is just a temporary proposition? A. Certainly.

Q. Now, with regard to the transportation conditions; take the line of the New York Central,
690 extending into the State of New York from the west, through Buffalo. Are the transportation conditions within the State of New York different from those in the territory west thereof? A. West of the State of New York?

Q. Yes; in other words, what I am trying to get at is this, whether or not there is a difference in

691 transportation conditions within the State of New York, which may possibly justify a lower level of rates within the State of New York? A. I should say not, sir.

Q. Are you familiar with the transportation conditions generally in the territory west of the State of New York? A. Yes, sir. 692

Q. And in your judgment the transportation conditions are sufficiently similar to justify the same level of fares in that territory as in the State of New York? A. Yes, sir.

Q. Are you familiar with the transportation conditions in New Jersey, and in Massachusetts and Connecticut? A. Yes, sir. 693

Q. Are the transportation conditions generally in those states, substantially the same as those within the State of New York? A. I should say particularly in New England, because of the density of traffic.

Q. That is to say the density of traffic in New England is relatively quite heavy? A. Yes, sir. 694

Q. Especially southern New England? A. Yes, sir.

Q. Take the line of the Lehigh Valley, or the Lackawanna, both of which I believe enter the State of New York from the south? A. Yes, sir.

Q. Are the transportation conditions on those lines within the State of New York more favorable than they are within the State of New Jersey and the State of Pennsylvania? A. I should say not, sir. 695

Q. Is it your judgment that the transportation conditions are such that the rate of fare should be the same? A. I think so.

696 Q. Do you know of any instance where the transportation conditions of any interstate railroad entering New York, are more favorable with regard to its intrastate traffic than they are with regard to interstate traffic? A. I should say none.

Q. Well, then, to sum up your various answers,
697 they seem to come down to this: That there are no transportation conditions within the State of New York — and when I say transportation conditions, of course, I mean geographic conditions and traffic conditions, everything bearing on the cost of the service — I take it that your answers might be construed to mean that the transportation conditions in the State of New York as a
698 whole, are not more favorable than they are for the various interstate hauls into and out of the State of New York via the lines of these railroads? A. That is correct.

Exam. LaRoe: Do you have any further questions?

699 Q. (By Mr. Hale) In that connection, Mr. Vosburgh, don't you think running upon a water-level absolutely to Albany, then running on a water-level from there to Buffalo, make conditions more favorable for the New York Central than for the Lackawanna? A. That is one feature, yes.

700 Q. But that is not sufficient to qualify your answer, you think? A. The conditions, so far as that is concerned, are no different, for instance, in New England than they are in New York State.

Q. I had in mind particularly the competition between here and Buffalo. Would not a diagram

of the elevations the Lackawanna has to overcome be very much greater than the New York Central? A. Yes. 701

Q. Would not that be true of the Erie and the Lehigh? A. Yes.

Q. And is not the density of traffic along your line, including the Hudson Valley cities of Albany, Schenectady, Utica and so on to Buffalo — would not that give you a density of traffic that is lacking on all of these other lines? A. Yes, but it all requires the same service. 702

Exam. LaRoe: I do not want the general nature of my inquiry to be misunderstood or its purport to be misunderstood. Of course, we always find in a large State, different transportation conditions in various parts of the State, and I think it will be generally understood that the traffic conditions along the Hudson river, and along the Mohawk river, are much more favorable, for example, than they are in the mountain regions in other sections of the State, but I take it that the water level route is used quite as much by interstate travelers as by intrastate travelers, and my questions were merely intended to develop the question whether, taking the territory as a whole, the conditions in southern New York, for example, were more favorable than in northern New Jersey, northeastern Pennsylvania, or whether the transportation conditions in eastern New York were more favorable than western Massachusetts and western Connecticut. I was trying to ascertain whether there was any reason for excepting the State of New York as a whole from a general level of rates than was applicable throughout a given territory. 703 704 705

706 The Witness: Might I say that doubtless Judge Hale's reference to the water-level route applies to our main line, and the operating conditions on other parts of our railroad within New York State do not differ materially from the lines he mentioned so far as grades, etc., are concerned.

707 Q. (By Mr. Hale). That is quite true of your Adirondack division? A. That is true of the Pennsylvania division.

Q. (By Mr. Paulding). And the Boston and Albany? A. Yes, sir.

708 Q. (By Mr. Griffin). The operating conditions over your main line are more favorable than the other lines in surrounding states? In that particular territory, because of lack of grades.

Q. The population, in number, too? A. Yes, sir, but the population requires service.

709 Q. (By Exam. LaRoe.) Is not the route from New York to Chicago generally regarded as the best one from the company's point of view? A. We naturally feel that it is.

710 Q. (By Mr. Paulding.) Well, now, what is the fact, Mr. Vosburgh — is it not that on trains leaving New York for western points, whether within or without the State of New York on any of these railroads excepting on one train passengers are accepted and do ride both interstate and intrastate in the same cars and on the same train? A. Yes, sir.

Q. (By Mr. Hale.) I would like in this connection to get a little information. It may be legitimate here. What percentage, if you can tell us,

of passengers on the Empire State, going west, 711
have already signified their intention to go beyond Buffalo by the purchase of transportation? A. Judge, you have picked out the one train on our railroad which is almost exclusively an intrastate train. It carries only coaches and parlor cars, and as I say, it is almost exclusively intrastate. That is not true of any other important 712
train on the railroad. We have trains leaving for Chicago through the day, carrying sleeping cars to Chicago and the west, on which we handle intrastate travel, and which could be used without the slightest difficulty in defeating the interstate fare, as brought out this morning in the testimony. 713

Q. Now, that is a very fair answer in all respects but the one I want, namely, what percentage, if there be an ascertainable percentage on the Empire State going west, are really interstate? A. I do not think I could answer.

Q. Is there 1 per cent? Well, I just said I don't think I can tell you. 714

Exam. LaRoe: Are there any further questions of this witness?

Q. (By Mr. Holmes.) In your line running from, we will say Dunkirk down toward Titusville, what was the local fare in 1907, up to the time the Federal order went into effect? A. I 715
am not sure, I would say 2½ cents a mile.

Q. And on the line going down to Williamsport? A. 3½ cents per mile.

Q. During that time was there a mileage book sold at a less rate net than 2½ cents? A. There

716 was a mileage book sold in that territory at, as I recall it, 2¼ cents net.

Q. In other words, there was $35 collected for a thousand mile book, with a rebate of $2.50 or $3.50, as the case might be? A. I think so.

Q. You are familiar with the traffic between Detroit and Chicago? A. In a general way.

717 Q. And the rate between Detroit and Chicago in 1907, or we will say prior to the Federal control, was what? A. I do not believe I can tell you, Mr. Holmes.

Q. Well, it was based on the Wabash mileage at any rate? A. I would not undertake to tell you that.

718 Mr. Holmes: I would like to have the record show the rate over the Wabash railroad and our line between Detroit and Chicago on passenger fares, and I would like to have the mileage book rate, the gross and the net.

Exam. LaRoe: What is the object of that, Mr.

719 Holmes?

Mr. Holmes: Well, the object is simply to show in the further proceeding of which this may be part, the mileage book question which was brought up here this morning. It has a bearing on the New York Central Lines. Nevertheless, I don't care to come in on that.

720 Exam. LaRoe: I prefer that we leave that to a subsequent proceeding. I cannot concede, if I correctly understand this proceeding, that the Commission will make any order in this case with regard to mileage books — that is the propriety of issuing them. I do not understand that to be one

of the issues in this proceeding. Is that your 721
understanding, Mr. Paulding?

Mr. Paulding: As part of the general case, Mr. Examiner, that the statute is here in New York as to the issuance of a two-cents mileage book.

Exam. LaRoe: You do not have any mileage 722
books in effect?

Mr. Paulding: No, and it was only as part of the history in the case that I put it in. What we are asking is the application of the Interstate Commerce Commission's order, interstate to State rates, and that of course, includes all rates.

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Mr. Holmes: The question has a bearing on the net earnings of the road previous to government's control, and previous to the time of the Interstate Commerce Commission's order of this increase.

Exam. LaRoe: Of course, our tariffs show in Washington what the rates are between Detroit 724
and Chicago during any period that you have in mind. They also show what the distances are and what mileage books are, so we have the information right there.

Mr. Holmes: I have the information in connection with this, however, and I will bring it up and file the report with you as part of these proceed- 725
ings.

Exam. LaRoe: Very well. You may do that. Is there anything further from this witness?

(No response.)

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Exam. LaRoe: That is all.

(Witness excused.)

WILLIAM S. KALLMAN was thereupon called as a witness, and having been duly sworn, testified as follows:

727 Direct examination:

Q. (By Mr. Paulding.) What is your position? A. Commerce assistant to the vice-president, traffic department, New York Central Lines.

Q. You have been connected with the railroad
728 business in New York State for a number of years? A. New York Central, twenty years; thirty years altogether.

Q. Have you had any particular experience with the rates in the milk and cream business in the State of New York and interstate in your locality? A. Yes, sir.

Q. Have you made a study of that situation?
729 A. Yes, sir.

Q. And you have testified before the Commission a number of times, upon matters particularly in so-called milk and cream cases?, A. 8558, yes, sir.

Q. The rates upon milk and cream were on Au-
730 gust 26th, interstate, advanced 20 per cent in accordance with the decision of the Interstate Commerce Commission, were they not? A. Interstate, yes.

Q. And intrastate, what happened? A. No advance — that is within New York State.

Q. Will you in your own words give us a pic-

731 ture, if you can, of the situation in the milk and cream business in the State of New York, and in the surrounding states, interstate and intrastate? A. The rates on milk and cream into New York — and when I say milk and cream, that includes buttermilk, condensed milk, evaporated milk, pot-cheese, skim-milk — they are all carried in the 732 same character of service — were fixed by the Commission in Docket No. 8558, reported in 45 I. C. C. 413, into New York city, Hoboken, Weehawken and Jersey City, on a mileage basis, graded from ten miles up to 630 miles. Of course, those rates were fixed by the Commission as applicable to interstate traffic, but the New York Central adopted the same rates as to intrastate 733 traffic into New York city at that time. The New York Central transports into the Metropolitan district, which includes, I will say, New York, Brooklyn, The Bronx, Hoboken, Weehawken and Jersey City, about 40 per cent of all the milk and cream that is consumed. The New York Central operates into the New York district, nine milk 734 trains every day, 365 days a year, approximately 160 cars, and the tonnage of the milk and cream is shipped in various packages, such as cans and bottles and so forth, but calculated into 40 quarts a can, the daily transportation of milk and cream by the New York Central is approximately 32,500 40-quart cans on a calculated basis of bottles and 735 cans. Of that 40 per cent of the total consumption in this district, about 75 per cent is intrastate; the other 25 per cent is interstate. The New York Central hauls one milk train on the Harlem division which is purely intrastate. An-

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other train is received from the Rutland railroad at Chatham, New York, all of which is interstate. That train has about sixteen cars in it, and it stops at Ogdensburg, New York, on the Rutland railroad, and Ogdensburg is also reached by the
737 New York Central direct. That milk train picks up milk across the State of New York to Rouses Point, and picks up milk through Vermont, and also again picks up a little milk in New York State. The New York Central receives from the Central New England railroad at Beacon every night a train of milk, which is combined with milk
738 picked up on the Hudson division south of Albany. It receives from the Delaware and Hudson one train daily at Albany, all of which is intrastate, originating on the Delaware and Hudson between Albany and Binghamton. The other it receives at Troy, and that milk transported on that train is largely interstate, by reason of the movement of the train over the Delaware and
739 Hudson railroad. It also receives from the Ulster and Delaware at Kingston a milk train every day. That is all interstate, because it moves to New Jersey and is delivered at Weehawken, New Jersey. It originates on its own lines west of Albany, three milk trains a day, all of which is intrastate.

740 The deliveries of the milk on the New York Central are at 30th street, 130th street and Melrose Junction, New York city. It also delivers milk at White Plains, Mount Vernon, Tarrytown and Yonkers. Some of it is intrastate and some of it interstate; and one train on the river division of the West Shore, which moves to Weehawken and is interstate.

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At the time of the Commission's decision in Case 8558, the net result of the adoption of those rates by the New York Central, as applied to intrastate traffic, was a reduction in its revenue, but from time immemorial, rates into New York city have been carried on an equal zone basis via all intrastate and interstate routes. The New York Central adopted the same rates that were fixed by the Commission in the interstate case, and that condition exists to-day, with one exception. The Commission itself stated that rates on milk on the Ulster and Delaware railroad should be properly higher than rates from points on other roads of origin. That is the single exception.

If we take the line of the Delaware and Hudson railroad, it will be seen that that railroad has a line of railroad extending from Whitehall, New York, eastwardly to Castleton, Vermont, thence southerly to Eagle Bridge, New York. That is the end of the Delaware and Hudson railroad on its line down to Eagle Bridge. That line crosses the Vermont State line four times between Eagle Bridge and Whitehall, and from all of those points including Eagle Bridge that are shown in red circle on the map, milk is regularly shipped to New York. The train stops at Eagle Bridge, proceeds northerly to Castleton, crosses the Vermont boundary line to Whitehall and down to Troy, where the New York Central takes it to New York. That is a daily service. A farmer located just east of the Vermont line to-day is bearing a 20 per cent increase over the rates in effect in August, 1920, while his neighbor just across the line has no increase.

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746 Q. That is an actual condition, is it? A. That is an actual condition. The Central New England railroad, from which the New York Central receives the same load of milk every night at Beacon, opposite Newburgh — its line runs across the Connecticut boundary line — if it has a creamery located in Connecticut, shipping to New York,
747 the farmer pays more than his neighbor just west of the New York State-Connecticut line.

On the Ulster and Delaware they have higher rates than apply on other roads; but take the West Shore railroad: The West Shore railroad has a branch extending from Kingston down to
748 Campbell Hall, forty miles, called the Wallkill Valley branch. About six or seven carloads of milk originate there every night. That milk, being delivered at Weehawken and being moved to New Jersey, pays the 20 per cent increase, but a farmer on the east side of the Hudson river, his deliveries being at New York city, bears no
749 increase.

Now, Mr. Examiner, I would like to hand you a map of the railroad of New York State.

Exam. LaRoe: Do you want this filed in the record?

The Witness: Yes, sir.

750 (The map was thereupon received in evidence, marked, "Complainant's Exhibit No. 11, Witness Kallman," and is forwarded herewith.)

The Witness: As is shown on this map, Mr. Examiner, in colors, the lines of the railroad that transport milk from points in New York State

to New York City, and compete with the New York Central Railroad — you observe the lines of the New York, Ontario & Western Railroad shown in green, running up from the state line to Delhi, Edmeston, Utica, Rome and Oswego, and the lines of the Delaware, Lackawanna & Western Railroad are shown as extending from the Pennsylvania–New York State boundary line up to Richfield Springs, Utica and Oswego. The lines of the Lehigh Valley Railroad extend from the New York State-Pennsylvania boundary line to Camden, N. Y., North Fairhaven on Lake Ontario, Auburn, Geneva, Naples, Hemlock and Rochester. I should have said the Delaware, Lackawanna & Western also has a line to Buffalo. 751 752 753

Q. Do you reach Syracuse with the Delaware, Lackawanna & Western? A. Yes, sir; I mentioned Oswego as the uttermost end of the Pennsylvania Railroad, extends from the New York State-Pennsylvania boundary line to Buffalo. I am speaking now of milk traffic points of origin, not necessarily the ends of these railroads, from the Pennsylvania State line to Buffalo, and as far as Mayville, New York. 754

I should have stated the territory of origin of the milk traffic of the New York Central which is delivered in New York City. It is received on the Harlem division of the New York Central, extending from New York City to Chatham, at a point north of Brewster, about 35 miles up from New York. It also originates milk on the Hudson division north of Poughkeepsie to Albany. That milk is intrastate. It receives milk on its Mohawk division, extending from Albany to Syracuse. It 755

756 receives on the Shenango branch of the West Shore Railroad, extending from Syracuse to Earlville, 40 miles. It receives milk on all of its stations on the Ontario and St. Lawrence divisions, north of the line from Albany to Syracuse, and east of the line from Oswego to Syracuse. That is the great bulk of the milk traffic today.

757 That extends as far as Massena Springs, New York, near the St. Lawrence River, where two cars of milk start every morning from Messina Springs at seven o'clock and arrive at New York, midnight. It also receives some milk on its main line west of Syracuse, to Lyons, New York.

758 The milk it receives from connecting lines are a car from the Lowville and Beaver River Railroad at Lowville, New York; a car from the Albany Southern Railroad at Albany, New York; a car from the Mohawk Railroad at Mohawk, New York—the Oswego & Herkimer Railroad, I should have said; a car from the Norwood & St. Lawrence at Norwood, N. Y.; one trainload

759 from the Delaware & Hudson at Albany, which originates on its line between Albany and Binghamton; one trainload from the same railroad at Troy, which originates on its line between New York State and Vermont.

As I said at the outset, 40 per cent of the whole milk trade of New York is hauled into New York

760 *on the New York Central and of that approximately 75 per cent is intrastate.* I also said we received a train from the Ulster & Delaware at Kingston, New York, delivered at Weehawken. The traffic itself requires immediate delivery upon arrival, and that has brought about the delivery

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of the milk at the Jersey railroads on the Jersey shore of the Hudson River, and those roads that do transport the milk traffic keep the ferries in operation at night principally for the accommodation of the milk traffic, which is very extensive with all of them, so that the situation with the New York Central Railroad is that the lines on 762
both sides of the Hudson River, one being an intrastate line, the other an interstate line, we charge higher rates on milk originating in New York State and transported over the rails operated by the New York Central Railroad at Weehawken, than we do milk originating on the other side of the river, transported wholly intra- 763
state into New York City. All of the other Jersey roads, the Delaware, Lackawanna & Western, the New York, Ontario & Western, the Erie, the Lehigh Valley and Pennsylvania Railroad deliver their milk either at Hoboken or Jersey City.

A glance at the map will show that the roads that have been colored with green, red, yellow and 764
blue largely reach into the same territory the New York Central does.

The general rule in the sale of milk by the farmers today is it is sold and delivered at the creamery. It is weighed, and the farmer's return is based upon the butter fat content of the milk. Take a point like Camden, New York, which is reached by the New York Central and Lehigh 765
Valley, the creamery may be located on the rails of the Lehigh Valley or the New York Central but these farmers are paid on a periodical basis, so that right now, even with the 20 per cent disadvantage in the through rate against a farmer

766 using an interstate route, he would not be benefited until his contract with the creamery has expired. After that he might fight to have the rates continued as they are, just to draw his milk to the adjacent station of the New York Central Railroad and get the advantage of the 20 per cent increase in rates.

767 Q. (By Exam. LaRoe): So at the present time this difference does not — A. Does not make any difference whether — they are under periodic contracts, but when those contracts expire, the result would be in many cases that the farmers would draw their milk to the creameries on the New York 768 Central, instead of to the creameries on competing roads.

Q. To whom does this make a difference now? A. The wholesale receiver, Borden Company, Sheffield-Slawson Company, mostly, who are the largest operators. They operate creameries all over the states of Connecticut, New York, Ver- 769 mont and New Jersey, and they pay for the milk on the basis of the butter fat content. Whatever advantage has accrued from those milk adjustment rates, in my judgment they are getting the benefit of.

Q. (By Mr. Paulding): Take the milk district in the western and southern part of the state is 770 a very large district, is it not? A. That is mostly handled in passenger trains and baggage cars.

Q. Some of that goes — A. In that case that would not be sold on that basis. The farmer there would elect for himself whether he would ship it into Buffalo or try the New York market.

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771 Q. Which is done; are both kinds of traffic— A. No, the milk that supplies the cities of Syracuse, Rochester and Buffalo is either milk hauled directly into the cities by the farmer, or shipped in on passenger trains and baggage cars.

772 Q. But the farmers in that district, do they ship as well to Rochester, Buffalo and Syracuse as to the City of New York? A. Well, it would be to their interest if they shipped it to Buffalo and Rochester. They get better prices and don't have to deal through the receiver.

773 Q. I mean the distance itself; milk goes both east and south and west? A. It does and the milk will find the market where it gives the farmer the most money.

Q. Not only intrastate, but interstate? A. Interstate, both.

774 Q. And the fact is that today, as a matter of rate, the farmer living perhaps two miles west of the New York State line, has a distinct advantage as to rate over the farmer living two miles east, over the line? A. Absolutely. I think the most flagrant illustration of this discrimination is the line of the Delaware & Hudson Railroad from Eagle Bridge to Whitehall, crosses the Vermont boundary line four times. The farmer, depending on the advantage of his location, subjects himself to a penalty of 20 per cent.

775 Q. But the milk on all of these railroads transporting milk into the city of New York, is that of a similar character? A. Entirely.

Q. That is transported in solid trains? A. In solid trains, milk trains, and I would like to point out in that connection — I haven't the

776 decision with me — have you the decision in ex parte 74?

Q. Yes. A. The Interstate Commerce Commission in its decision in Ex parte 74, said, page 242: "Milk and cream are usually carried in passenger trains, and the revenue therefrom is not in-
777 cluded in freight revenue. Rates on these commodities may be increased 20 per cent."

Now, with all deference to the Commission, so far as that statement has any application to the territory east of the Mississippi river and north of the Ohio and Potomac rivers, it is incorrect. The milk and cream that is carried into the larger
778 cities, and in that I include New York, Boston, Philadelphia, Baltimore and Cincinnati, is not carried in passenger trains. It is carried in milk trains. It is true the service from the standpoint of speed of those trains is nearly equivalent to the passenger trains, but they are not passenger trains at all. No passengers are carried on them,
779 solid milk trains. The type of the car is an insulated baggage car, suitable of refrigeration from heat in summer and cold in winter; but they are not passenger trains. However, the Interstate Commerce Commission's classification of accounts provide as a primary item 109, that revenue from milk and cream, when it is transported at rates per package, regardless of weight, shall
780 be reported as milk revenue, and when transported at rates per 100 pounds, shall be reported as freight revenue. Merely as to this milk traffic into these large cities in this territory, it is reported as milk revenue, not passenger revenue, because it is carried — 98 per cent of this milk

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traffic, outside of passenger trains and baggage cars is carried at rates per package, regardless of weight.

Q. (By Exam. LaRoe). Then the latter part of the Commission's statement is correct? A. Is not included in freight revenue. Yes, that is correct. Now, the Public Service Commission in its decision as to milk traffic said: 782

" Insofar as the petition asks an increase of 20 per cent in rates on fluid milk, cream and articles taking the same rates, the Interstate Commerce Commission treated this traffic on the same basis as it treated the passenger rates, because milk and cream are usually carried in passenger trains. 783 It may be that in this state the great bulk of milk and cream is carried in special milk trains, but their equipment and movement harmonizes more closely with passenger operation than freight operation. Fluid milk and cream and articles taking the same rate should, therefore, be excepted from the operation of this order." 784

I am trying to convey that was a misconception under which this milk and cream traffic is classified generally. Certainly as to the large cities in the eastern part of the country, it is not transported in passenger trains. It is transported in special milk trains.

Q. But the carriers in Ex parte 74, you will recall, asked the Commission to grant a 40 per cent increase or whatever it was in freight revenue? A. True. 785

Q. Milk revenue is not freight revenue, is it? A. That is entirely correct, and I may say in explanation of that, there was a misunderstanding about

786 that. What they intended to apply for was a 40 per cent increase in all rates on milk, and the accounting department did not figure in the revenue on the milk that was carried on rates per package.

Q. (By Mr. Paulding). Answer this question, will you? The milk as brought into the City of
787 New York by the railroads you have mentioned, is not entirely from the State of New York; some of it is from other states? A. Oh, no; the nearest I can arrive at that is this: Of the whole milk traffic into the New York city district, the New York Central hauls 40 per cent, and of that 40 per cent, approximately 75 per cent is intrastate. All the rest of it is interstate.

788 Q. As to the roads delivering upon the Jersey shore, on the other side of the river, the milk which they deliver does not all originate within the State of New York? A. Oh, no; Pennsylvania and New Jersey.

Q. And that takes the higher rate? A. That
789 takes the higher rate.

Mr. Paulding: That is all I have.

Cross-examination:

Q. (By Mr. Hale). Just one question, Mr. Kallman, about that situation up between Vermont and New York. You say there are three little
790 patches of territory, as I understand you, in New York, whose stuff goes through Vermont before it gets to New York city? A. Yes.

Q. Does the New York man pay under this present arrangement the interstate rate? A. He pays it on the interstate traffic. We have fourth sec-

tion relief order with the Interstate Commerce Commission. 791

Q. So really the State line makes no difference? A. Yes, it does, because on traffic originating and terminating in New York State, we don't charge the 20 per cent increase.

Q. In other words, you don't think that interstate commerce? A. No, sir. 792

Q. Although the train goes outside of the line? A. That is correct. We have relief of the fourth section — fourth section relief from the Interstate Commerce Commission, but it is a situation that cannot continue.

Q. Is that not according to all the definitions we have interstate traffic? Is it not interstate traffic? A. Yes, but we have a fourth section order, traffic relief. If that case ever comes to trial, that won't be continued. It is a temporary relief, for the purpose of putting these rates into effect immediately. 793

Q. (By Exam. LaRoe). I am afraid I miss the point there. You have fourth section relief to protect the lower rates to New York, interstate? A. Yes. 794

Q. That applied where? A. Intrastate.

Q. Are your interstate rates lower than your intrastate rates? A. No, they are higher.

Q. You have got me all mixed up. A. Take the map you have before you, Mr. Examiner, please. Eagle Bridge, New York, is on the line of the Delaware and Hudson, extending down from Castleton, Vermont; that is the end of the line; they start milk out of Eagle Bridge. They haul it north through Cambridge, crossing the line of 795

796 Vermont to West Rupert, back across the line at an unnamed point twice, finally reaching Castleton, Vermont, then over Whitehall into New York State, then over the main line of the Delaware and Hudson to Troy. We have a 36 section relief order from the up-State Commission, granting
797 relief from the long- and short-haul clause as to all rates covered by its order, and we have a fourth section order from the Interstate Commerce Commission as to interstate traffic. If either one of these cases should be set for hearing, I am frank to say in my judgment either Commission would not sanction a departure from the
798 long- and short-haul clause. Eagle Bridge is the end of the line, but we have the authority to do what we have been doing up to the present time.

Q. Let us go back to West Rupert again. Take a can of milk originating there and moving through Castleton to New York, the interstate rate from Rupert — let me start the other way
799 around. That route to Castleton is a very circuitous route. A. It is.

Q. There is a more direct line through Cambridge? A. But that is the end of the Delaware and Hudson Railroad at Eagle Bridge. It wants to get the 100-per cent haul for itself.

Q. Yes, but as I understand it, the rate via that
800 circuitous route meets the rate of the direct route to New York. A. No, the rate from Eagle Bridge is what it was on August 25, 1920. The rate from West Rupert, Vermont, is 20 per cent higher, because it is in Vermont. That situation cannot exist continuously.

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Q. You mean to say that you did not increase by 20 per cent the rate from Eagle Bridge to New York, via Rupert? A. I should say not. 801

Q. Why didn't you? A. Because it would be regarded as intrastate.

Q. Who would regard it as intrastate? A. I do not know.

Mr. Waldron: It is all interstate from Eagle Bridge clear to Fairhaven, inclusive, because it passes in and out of the State of Vermont. We increased all of the rates. 802

Exam. LaRoe: Then Mr. Kallman's testimony will have to be corrected to that extent.

The Witness: I am in error. 803

Mr. Waldron: To Whitehall there has been no increase, but Fairhaven, the last station in Vermont has been increased, and all stations south of Fairhaven and Castleton, whether in the State of Vermont or in the State of New York.

The Witness: I stand corrected. 804

Q. Well, Mr. Kallman, in a Shreveport case of this kind, it is usually necessary for the Commission to make some finding as to who is prejudiced or hurt, and who is unduly preferred by such an adjustment as this.

"If you had to make a finding, in your own words as to who was really hurt by this adjustment of milk rates, who would you say was really hurt by the present adjustment? A. I should say that the producer of milk at Whitehall in this case would be unduly favored. 805

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806 "Q. You said he did not pay the freight?" A. I know, but he will when his contract expires with the receiver.

Q. Confirming your answer to the period of the present contract, who will be hurt? A. As long as these contracts exist, I do not see how the farmer could claim he was injured, but as soon as
807 they expire, he would be. These contracts are sometimes for a month, sometimes for three months — rarely more than three months in duration. That is the bulk of it — not all the milk is sold that way, but the bulk of it is handled that way.

Exam. LaRoe: Is there anything further from
808 Mr. Kallman? (No response.)

Q. Mr. Kallman, Mr. Paulding asked you whether the milk coming in on the Jersey shore — whether it came partly from New York and partly from other states, and you said partly from other states. A. It does.

809 Q. Is it not the fact that much or the greater part of it originates in New York State? A. Yes, perfectly true; a little originates in Pennsylvania and very little in Jersey.

Q. You also made a statement which perhaps I misunderstood. I understood you to say that milk from the southern and western part of New York
810 State was mainly carried in passenger cars and baggage cars. A. Buffalo, Rochester and Syracuse,— milk for these points.

Q. (By Mr. Taylor) Is it not a fact that the Delaware, Lackawanna & Western and Erie carry milk in large quantities in milk trains from south-

ern New York? A. Certainly, the bulk of it. Every one of the railroads reaching into Jersey City and Hoboken, the Delaware, Lackawanna & Western, the Ontario & Western, the Erie, the Lehigh Valley and Pennsylvania carry their milk into Jersey City and Hoboken in solid milk trains, one, two or three trains a night, and that milk that comes on the Pennsylvania comes from very near the boundary line between New York State and Pennsylvania. 811 812

Q. (By Exam. LaRoe) Will you state once more just what milk traffic originating on the line of the New York Central, if any, goes to Weehawken? A. One train. That train starts from Kingston, New York, and receives there 9 or 10 or 11 cars from the Ulster & Delaware, all of which orignates in New York State, and picks up milk between there and Newburgh which is delivered at Weehawken. 813

Q. All the rest of your milk traffic then goes down the east side of the river. A. But it is not all intrastate. 814

Q. I didn't say it was. A. The Rutland Railroad comes down through Vermont and part of the D. & H. milk.

Q. (By Mr. Taylor) Does milk into Rochester and Buffalo move to some extent from the same territory as milk which moves to New York City? A. It does, and in that case that milk there is shipped into Rochester on passenger trains, and is not handled under contract with the receivers, as is the case with New York City; so there the 815

816 farmer would have the option of electing for himself where he would send his milk.

Q. And the freight rate would affect their relationship as between the shipment to Buffalo or Rochester and the shipment to New York? A. It would; 20 per cent is an item of freight rate.

817 Q. (By Mr. Paulding) In this train to Weehawken, you did not mean to say outside of that one train all of the other milk into the New York Central comes down over the New York Central; lots of milk comes over the Harlem division? A. Yes, sir.

Mr. Paulding: Now, I will formally offer the 818 decision of the Interstate Commerce Commission in Ex Parte 74 and the order of the Commission, dated July 29th.

Exam. LaRoe: We won't file them as exhibits, because it is not necessary.

Mr. Paulding: I have before me a few copies 819 of the figures that were asked for from the Long Island Railroad this morning.

Exam. LaRoe: Can you file them in exhibit form?

Mr. Paulding: I can file them in exhibit form.

Exam. LaRoe: If you will, please. Mark that 820 Exhibit No. 12.

(The statement was thereupon received in evidence, marked, "Defendant's Exhibit No. 12, Witness Kallman," and is forwarded herewith.)

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Mr. Paulding: Do I understand that Ex Parte 74, the decision is received and is part of the record — is physically in evidence? 821

Exam. LaRoe: Yes, that is not necessary; we will understand that that is part of the record.

Mr. Paulding: Then that completes all that I have to offer, with the exception of the copies of the exhibits. 822

Exam. LaRoe: Does that complete your presentation?

Mr. Paulding: That completes our presentation.

Exam. LaRoe: Now, who is next? Who else wants to be heard? 823

Mr. Clark: I have a little testimony.

Exam. LaRoe: We will hear you next.

JOHN ADICKES was thereupon called as a witness, and having been duly sworn, testified as follows: 824

Direct Examination:

Q. (By Mr. Clark) Mr. Adickes, where do you live? A. 211 Fulton Street, Jamaica.

Q. You have lived there how long? A. In Jamaica I have lived since 1855 — in the village of Jamaica. I have lived in my present residence 18 years. 825

Q. Have you been interested in transit problems and civic problems in the Borough of Queens for a great many years? A. I have.

Q. For how long? A Since 1880.

826 *Paper 4*

Q. And you have made a study of the conditions as they affect the people of Queens? A. I have.

Q. During that time? A. To a certain extent.

Q. You are a member of what civic organization? A. I am a member of the Queens Chamber
827 of Commerce, and chairman of their transit committee; also Jamaica Board of Trade and chairman of their transit committee.

Q. Did you make a study to some extent of the comparative rates between places on Long Island and places in New Jersey, prior to this 20 per cent increase granted on August 26th? A. I did, in
828 Jersey and points in Queensboro.

Q. Did you find that there were discriminations in favor of some portions of New Jersey, as against Long Island—some portions of Long Island? A. I did, from 40 to 100 per cent.

Q. Where are the low rates in New Jersey? A. From Manhattan to Newark and to the towns
829 adjacent to Newark.

Q. That is, Newark is the central point which is a focus of numerous trolley lines? A. Yes, sir.

Q. (By Exam. LaRoe) What fares do you use to Newark, those of the Hudson & Manhattan or the railroad? A. The Hudson & Manhattan are the fares that show the discrimination.

830 Q. What line does not serve Long Island? A. The Hudson & Manhattan does not.

Q. (By Mr. Clark) The Pennsylvania sells its tickets over the Hudson & Manhattan line? A. The Hudson & Manhattan gives the same service to New Jersey that the Interborough does to Queensboro from Manhattan.

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831 Q. Does the Pennsylvania in your estimation give the same service from points in New Jersey that the Long Island gives to points in Long Island? A. The Long Island does not give the same service from its junction points with the Interborough Rapid Transit System at Hunter's Point and Woodside Junction that the Pennsyl- 832 vania and the Hudson & Manhattan give at Jersey City and Manhattan Transfer.

Q. Well, because of that, did you have anything to do with instituting the movement which resulted in the passage last year of what is known as the Karl Pette Bill? A. Yes, by a resolution of the Jamaica Board of Trade, a bill was prepared 833 to require the Long Island Road as a part of the Pennsylvania System, to give the same rates — to give rates in Queens not to exceed rates that the Hudson & Manhattan and Pennsylvania gives to points in New Jersey.

Mr. Clark: I would like to introduce in evidence a copy of that Karl Pette Bill, which is now 834 a law in the State of New York.

Exam. LaRoe: That will be received and filed without objection as Exhibit No. 13.

(The paper was thereupon received in evidence, marked "Defendant's Exhibit No. 13, Witness Adickes," and is forwarded herewith.) 835

Q. Since the increase was granted to the New Jersey Roads, have you had occasion to compare the rates charged by the Pennsylvania over its own lines, or over the lines of the Hudson & Manhattan Railroad Company and the rates charged

836 by the Long Island Railroad to points like Hunter's Point Avenue and Woodside, where it joins the City rapid transit system? A. I have.

Q. Is there still a discrimination in favor of New Jersey? A. There is still a discrimination of 20 to 80 per cent in favor of New Jersey.

837 Q. You believe with Mr. Hunter that testified this morning, that a discrimination in favor of the towns in New Jersey is calculated to increase the population of those towns, as against the population of the towns on Long Island? A. I do.

Q. Owing to that fact, did you prepare a complaint which I have here a copy of, asking the 838 Public Service Commission of the City of New York and State of New York for the First District, to eliminate those discriminations under the Karl Pette Bill, and to enforce the Karl Pette Bill? A. I was authorized by the Queens Chamber of Commerce to appear for the — as chairman of the Transit Committee to act with you.

839 Q. Just answer the question. You did file such a complaint? A. I did file by authority of the Queens Chamber of Commerce.

Q. Would you verify this copy? A. That is a copy of it.

Exam. LaRoe: That will be marked as Exhibit No. 14.

840 (The paper was thereupon received in evidence, marked "Complainant's Exhibit No. 14, Witness Adickes," and is forwarded herewith.)

Q. In your own residence on Long Island, and your large acquaintance there, have you ever known of any person buying an interstate ticket

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on the Long Island Railroad to a point outside of the State? A. I do not know of anybody. 841

Q. Would you say from your knowledge of the habits of the people in Queens County, that it is or is not a custom for any large proportion of those inhabitants to buy interstate tickets on Long Island, for journeys outside of the State? A. Well, I travel considerably myself and my family too, and have never heard of them, or I have never heard of tickets being sold, or a custom made of tickets being sold at the Long Island depot for stations beyond the State of New York. 842

Q. (By Exam. LaRoe) How do you buy them? A. Buy them from New York. 843

Q. How do you have your baggage cared for? A. My mileage book on the Long Island, or my fifty-trip book gives me the right to have my baggage checked at Jamaica. I have got one right here. If I am coming in from Utica, I have a ticket over the New York Central to New York, and this is from New York to Jamaica. 844

Q. You check your baggage on one ticket and travel on another? A. Oh, no; I travel on that too.

Q. (By Mr. Clark) When you get to New York, you buy a ticket to Utica? A. Yes.

Q. And that is the case with the majority of the people who live in the Borough of Queens? A. Yes. 845

Q. (By Exam. LaRoe) Now, this ticket apparently is good only between Jamaica and Brooklyn? A. It gives me the right to go to Long Island City.

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846 Q. You cannot get to Utica on this? A. No.

Q. When you start your journey at Jamaica to go to Utica, what do you show, the local ticket at Jamaica to get your baggage checked through to Utica? A. I buy my Utica ticket when I am in town.

847 Q. Then you show that to the Jamaica agent, in addition to this? A. Yes, in addition to that, or if I had my mileage book — we formerly used a mileage book.

Q. (By Mr. Clark) Now, Mr. Adickes, the city rapid transit system, so called, extends as far as Jamaica, does it? A. There is one line extends to 848 the village of Jamaica. That is four miles beyond the Brooklyn city line. Another division on Liberty avenue extends about two miles into the Borough of Queens, beyond the Brooklyn city line. What is known as the Corona avenue division extends into the Borough of Queens, about four and a half miles, perhaps five.

849 Q. That parallels the north side division of the Long Island Railroad? A. Yes; and another short division of the city rapid transit system extends to Astoria.

Q. I have here a copy of the map of the Borough of Queens, which I believe was prepared by you. Will you examine it and state whether it 850 was? A. Yes, I prepared that map.

Q. That shows the lines of the Long Island Railroad? A. Yes.

Q. It also shows the line which was made by the Long Island Railroad and the B. R. T. rapid transit company dividing the territory to which they would severally extend trolley lines? A. The

red line here shows a line that on an agreement between the Long Island Railroad and the Brooklyn Rapid Transit, by which they divided that territory and by which they were never to go beyond those lines. 851

Q. The Long Island Railroad Company, together with the Interborough Rapid Transit Company owns certain trolley lines up farther on Long Island? A. On the south side there are two trolley lines, acquired by the Interborough and the Long Island in about 1906. They acquired jointly and took control of both lines. 852

Q. Since they got control of those lines, has the Long Island extended any trolley lines or have any been projected? A. No, these lines, each had — under their franchises certain extensions were to be made, but since the Long Island has got control there have been no extensions made. 853

Q. Now, from Jamaica to Flatbush avenue, the Long Island has a local service? A. Has a local service. 854

Q. Do you know whether that was operated in competition with the service on the Brooklyn Rapid Transit Lines? A. It was operated in the middle eighties to compete with the Brooklyn Rapid Transit lines.

Q. The fare was reduced for that purpose? A. Yes, sir.

Q. The fare to-day is 11 cents from Jamaica to Flatbush avenue? A. Yes, sir. 855

Q. A distance of a little over nine miles? A. Yes.

Q. The fare on the city rapid transit lines from Jamaica to Brooklyn is five cents? A. Yes.

856 Q. The difference in fare does not keep the Long Island Railroad from filling its local trains, does it? A. No, their trains are loaded. In fact, they say they are overloaded on that division, which is a fact, and which would be relieved by them running the same service over their Long Island division to Long Island City or to Wood-
857 side.

Q. That is what you have been endeavoring to have the Long Island do, to give the same service to Woodside and Hunter's Point avenue, to the junction with the city rapid transit lines that they now give to Flatbush avenue, in Brooklyn? A.
858 That is correct, and we were promised that by Mr. Peters in 1909.

Q. And they have never done it — always have refused to do it? A. They have refused to give us those local trains to Long Island City, and I wish to say, Mr. Examiner, that Mayor Gaynor appointed me on the committee known as a com-
859 mittee to relieve congestion back in 1910. The Committee was composed of representatives from all of the boroughs, to make a study of some method of relieving the congestion in the congested part of Manhattan, and after making that study for a year, I could see that Queens Borough, if it had the proper service, would give relief to a great many of the congested districts. As it is
860 now, 70 per cent of the Borough of Queens is depending on the Long Island road for its transit. That portion of the borough that has a city system, especially on the Jamaica end, we have lower fares on the Long Island system beyond Jamaica; everything is based on three cents a mile,

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which in my judgment is a detriment to the city — to the railroad, because of the fact that this Atlantic Avenue division from Jamaica to Flatbush avenue is now a splendid paying proposition, according to the reports made by former officials of the road, and if that rate that they now have in New Jersey, based on the mileage, was in force as this Act provides, it would give all of these people in the congested district a chance to get from any of the suburban sections of Queens. 861 862

Exam. LaRoe: The map will be marked Exhibit 15.

(The map was thereupon received in evidence, marked, "Defendant's Exhibit No. 15, Witness Adikes," and is forwarded herewith.) 833

Cross examination:

Q. (By Mr. Paulding) In taking the map which you have just put in evidence from Mr. Clark, you said that showed the lines of the Long Island Railroad Company. You did not mean it showed all of the lines of the Long Island Railroad Company? A. It is an official map of the city in which all of the lines of the Long Island Road are laid. 864

Q. Not the whole of Long Island? A. No, Queens Borough.

Q. That is what I mean. Your testimony is confined to the Borough of Queens? A. Yes. 865

Q. You do not touch the other portion of the Long Island Railroad? A. No, sir.

Q. And when you said that through tickets were not bought from Jamaica to any points off of the lines of the Long Island, you confined your

866 testimony strictly to Jamaica? A. Not the points beyond Queens Borough.

Q. In other words, you are talking about the rapid transit proposition of the Long Island Railroad Company in the Borough of Queens? A. I was talking of the railroad situation in the Borough of Queens in comparison with the same
867 rates in New Jersey.

Q. Chiefly with the Hudson and Manhattan? A. Oh, no; the Pennsylvania picks up its passengers at Jersey City from the Hudson tube and also by ferry.

Re-Direct Examination:

868 Q. (By Mr. Clark) As a matter of fact, does the Pennsylvania have any great local business to the Pennsylvania station? A. Well, the statistics show that there were only — at the reports made to the Queens Chamber of Commerce showed that in 1915–1916 report to the Public Service Commis-
869 sion showed that the Pennsylvania passengers in and out of the Pennsylvania depot were about five millions.

Q. Through and local passengers? A. Yes, sir, through and local passengers. That same year the Long Island had out of the Pennsylvania station, by this report, thirteen millions of passengers.

870 Q. As a matter of fact, are not the fares on the Pennsylvania road to the Pennsylvania station put so high that all of the traffic is thrown in at the Hudson terminal? A. Yes.

Q. A difference of twelve cents on the local fares — one way fares? A. Before the 20 per cent

increase went into effect, a round trip ticket from 871
the Pennsylvania station to Newark, if I remember right, was 64 cents, but to get to Newark, if you wished to go that way direct, you could go, one who used the Hudson and Manhattan tickets, would only cost 33 cents for the round trip from Sixth avenue and Thirty-third street, one block 872
away — that could be bought for thirty-three cents. If you wanted to go in by way of the Pennsylvania station to Newark, you bought what was known as a terminal ticket, costing twelve cents, that enabled them to avoid paying the Government tax — 16½ cents and 12.

Exam. LaRoe: Mr. Clark, let me suggest you do 873
not get into too great detail on that.

Mr. Clark: That is all.

Q. (By Exam. LaRoe) Just one question. Is it your understanding that there is keen competition in the matter of these commutation fares? 874
That does not express my meaning exactly. Does the Borough of Queens, for example, compete actively with New Jersey and with New York State and with Connecticut for this commutation traffic for the commuters? A. For the suburban traffic?

Q. Yes. A. I would say it would be an advantage for the people of Manhattan to get in Queens 875
for one reason, that between Jersey City and Newark, practically there is a lot of meadow land, not suitable for residences.

Q. Aside from that, is it or is it not true that the communities on the Jersey side of the river

876 compete with Long Island for these commuters? A. They do.

Q. There is more or less rivalry between those communities to attract people to live within their respective districts. A. Yes, and they also have the benefit of the competition between the Pennsylvania, the Erie, the Delaware, Lackawanna &
877 Western and the Jersey Central, which we don't have in Queens Borough, outside of the city's rapid transit system.

Q. Do you think that that competition is sufficiently keen, so that a slight difference in the fares makes quite a difference. A. I am quite positive that it does make a difference in the de-
878 velopment of Queens Borough.

Exam. LaRoe: Is there anything further of this witness?

(No response.)

Exam. LaRoe: Is there anything further now?

879 Mr. Clark: I had some tables prepared. I telegraphed the Interstate Commerce Commission and asked whether the Long Island had put in any application. I received word they had not. I have a man working up fares. Perhaps he is through with some tables, showing the comparative rates.

880 Exam. LaRoe: We will give you permission to file later tables of comparative rates on Long Island passenger fares, with fares on lines in New Jersey, if that is what you have in mind.

Mr. Clark: Yes; also I had a table which shows various fares on the Long Island Railroad, which

881 range all the way from one cent to three cents a mile. I would like to file that, to show the injustice of the accrual if the straight 20 per cent increase was granted.

Exam. LaRoe: I think there will be no objection to filing that later. Now, do you have anything further?

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Mr. Clark: That is all I have.

Exam. LaRoe: It is going to be desirable to get this case submitted as soon as possible, in order that the Commission may take an early action as is practicable. Do you desire to file briefs in this case?

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Mr. Clark: I would like to file a brief.

Mr. Victory: The City would also like to file a brief.

Mr. Paulding: I would like an opportunity, and I will do it in a very short time.

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Exam. LaRoe: Do the parties desire oral argument before the Commission in Washington?

Mr. Hale: The Public Service Commission would like to be heard orally through counsel. Of course, there is a fundamental issue here, which you can readily understand, Mr. Examiner. I want the record clear on one point, and that is 885 that neither the New York Central nor any other railroad represented here has made any application to the Public Service Commission to increase any of these rates on any other basis whatever. If there is any misunderstanding on that point, I will call Mr. Paulding as a witness.

886 Exam. LaRoe: That is your understanding, is it not, Mr. Paulding?

Mr. Paulding: That is perfectly true. I will add simply this, that at the hearing before the Public Service Commission in August, upon an application of the railroads, Mr. Willard, who
887 was the only oral witness called by the railroads, laid a great deal of stress on the need of the railroads for additional revenue.

Exam. LaRoe: How soon can we get briefs ready? Will 20 or 30 days suffice?

Mr. Paulding: Yes, sir, ten days.

888 Exam. LaRoe: Can you get them ready by the first of October, Mr. Clark?

Mr. Clark: I think so, yes.

Exam. LaRoe: Will that suffice for you, Mr. Paulding?

889 Mr. Paulding: Yes.

Exam. LaRoe: Let the record show that all briefs will be due the first of October, and that there will be no reply briefs. Those will be final briefs. There will be no proposed report issued in this case. In other words, the report, when it comes out, will be the final decision of the Com-
890 mission. I shall try to arrange for oral argument soon after the 1st of October, and you will be duly notified as to the exact date later.

All statements and other matter for which permission has been given to be filed in this record, must be received in our office at Washington not later than one week from today.

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Please be sure that counsel are furnished with copies of anything that has been or will be submitted. If there is nothing further, the hearing is closed. 891

Mr. Mullen: May I ask that the appearance for the Public Service Commission, First District, be noted, and that they be given notice of the oral argument? My name is John A. Mullen. 892

Exam. LaRoe: Yes. The hearing is closed.

(Whereupon at 4:20 o'clock p. m., September 13th, 1920, the hearing of the above entitled matter was closed.)

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PAPER 5

INTERSTATE COMMERCE COMMISSION

In the Matter of Rates, Fares, and Charges of THE NEW YORK CENTRAL RAILROAD COMPANY and Other Railroad Companies in the State of New York.	No. 11623.

Submitted October 11, 1920. Decided November 13, 1920.

Certain fares, charges, and rates required by State authority to be maintained by the respondents within the State of New York found to be lower than the corresponding interstate fares, charges, and rates authorized by the order in Ex Parte 74, *Increased Rates, 1920*, 58 I. C. C., 220, and to be unduly prejudicial to interstate passengers and shippers, unduly preferential of intrastate passengers and shippers, and unjustly discriminatory against interstate commerce.

John E. Benton, for National Association of Railway and Utilities Commissioners.

Charles D. Newton and *Edward G. Griffin*, for the state of New York; *Ledyard P. Hale* and *Joseph A. Kellogg*, for New York State Public Service Commission, Second District; *Terence Farley* for New York State Public Service Commission, First District; *Fred W. Putnam*, for Minnesota Railroad & Warehouse Commission; *R. Hudson Burr* and *James E. Calkins*, for Railroad Commission of Florida; *Morton T. Culver*, *W. E. Trautmann*, *A. D. Rodenberg*, and *H. M.*

Slater for Illinois Public Utilities Commission; *A. E. Helm* and *W. L. Huggins,* for Court of Industrial Relations, State of Kansas; *J. H. Henderson,* for State of Iowa; *Hugh LaMaster,* for State Railway Commission of Nebraska; *Dwight M. Lewis,* for Board of Railroad Commissioners of Iowa. 901

John Holley Clark, Jr., for Chamber of Commerce of the Borough of Queens; *John Adikes,* for Jamaica Board of Trade. 902

Alfred P. Thom, Charles C. Paulding, Francis I. Gowen, John C. Bills, W. S. Bronson, Clyde Brown, N. S. Brown, George F. Brownell, E. G. Buckland, and *R. V. Fletcher,* for respondent carriers. 903

REPORT OF THE COMMISSION

FORD, *Commissioner:*

In pursuance of our findings in Ex Parte 74, *Increased Rates, 1920,* 58 I. C. C., 220, we authorized within a region that includes the State of New York an increase of 40 per cent in the interstate freight rates; 20 per cent in the interstate passenger fares, baggage charges, and rates on milk and cream; and also a surcharge amounting to 50 per cent of the charge for space in sleeping and parlor cars, to accrue to the rail carriers. 904 905

Thereupon the steam railroad companies serving the State of New York made formal application to the Public Service Commission of the State of New York, Second District, for permission to file effective on five days' notice, tariff supplements providing increases in the rates, fares, and

906 charges applicable to intrastate traffic in the State of New York corresponding with those authorized in our report. So far as the application related to rates and charges for the transportation of freight except milk it was granted by the Public Service Commission, by an order entered August 907 19, 1920, and the increases became effective August 26, 1920, contemporaneously with the increases in interstate rates. But so far as it related to passenger fares, sleeping-car and parlor-car fares, baggage charges, and rates on milk and cream, the application was denied by the Public Service Commission. Thereafter the principal steam railroads serving the State of New York 908 filed with us a petition for relief in accordance with the provisions of section 13 of the interstate commerce act. A hearing upon the petition has been held, and the views of parties in interest have been presented to us on brief and by oral argument.

This case raises again the question whether in 909 regulating interstate commerce, under authority reposed in us by Congress, we have incidentally the power of regulating intrastate commerce so far as it affects interstate commerce. In the *Shreveport Case,* 23 I. C. C. 31, we held that we did possess that power by act of Congress, and we pointed out:

910 > "Congress passed this act with full knowledge and profound appreciation of those decisions of the Supreme Court in which it had been held that state commerce was that wholly within a state 'and not affecting interstate commerce,' as is fully shown by the Cullom report of 1886, out of which grew the act to regulate commerce."

Paper 5

The position we took was sustained by the United States Supreme Court, and the principle on which we acted then continues to be our guide. But since then the general obligation resting upon us to exercise control over intrastate commerce so far as it affects interstate commerce has been put in the form of a mandate by section 13 of the interstate commerce act, as amended by the transportation act, 1920.*

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* SEC. 13 (3). Whenever in any investigation under the provisions of this Act, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this Act with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the co-operation, services, records, and facilities of such State authorities in the enforcement of any provision of this Act.

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(4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

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916 It has been urged in opposition to the application of this principle to the pending case that such incidental jurisdiction as we may possess over intrastate rates is contingent upon proof that discrimination exists affecting particular persons or localities. But inasmuch as the basis of our juris-
917 diction is our power to regulate interstate commerce, it follows that the decisive factor is whether the rates under consideration injuriously affect interstate commerce. It is no answer to this to say that if this conclusion be admitted it may have the effect of completely displacing State jurisdiction over State commerce. There may be cases in which intrastate rates affect interstate
918 commerce injuriously in ways so manifest as to make them subject to our control. There may be cases in which the connection of intrastate rates with the movement of interstate commerce is so remote and unimportant that we may properly disregard it. But in every case which puts in question intrastate rates, the decisive factor is
919 whether or not they affect interstate commerce injuriously to a considerable extent. If they do they are brought under our jurisdiction and made subject to our control, even although the whole rate structure of a State should be involved.

It has not happened heretofore that we have had occasion to make such an extensive exercise
920 of our authority as is now contemplated, and we could not be moved to do so save by the most cogent reasons. Such reasons have been supplied by the situation in which the transportation interests of the country were placed and the action taken by Congress to relieve that situation.

Our findings in *Increased Rates, 1920, supra,* were responsive, as the report shows, to legislation enacted by the Congress as part of the transportation act, 1920, approved February 29, 1920, now incorporated in the interstate commerce act as part of section 15a thereof, paragraphs 2 and 3 reading as follows:

> "(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided,* That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.
>
> "(3) The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission. In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management

926 of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation: *Provided*, That during the two years beginning March 1, 1920, the Commission shall take as such fair return a sum equal to 5½ per centum of such aggregate
927 value, but may, in its discretion, add thereto a sum not exceeding one-half of one per centum of such aggregate value to make provision in whole or in part for improvements, betterments or equipment, which, according to the accounting system prescribed by the Commission, are chargeable to capital account."

928 In accordance with these statutory provisions we designated four rate groups, one of which embraces the territory bounded on the west by the Mississippi river and on the south by the Ohio river and the main line of the Norfolk & Western Railway; and we authorized increased rates, fares, and charges that were designed to enable
929 the carriers as a whole in that rate group, "under honest, efficient, and economical management and reasonable expenditures for maintenance of way, structures, and equipment," to earn an aggregate annual net railway operating income equal, as nearly as may be, to 5½ per cent upon the aggregate value of the railway property of such car-
930 riers in that group, plus one-half of 1 per cent of that aggregate value for improvements, betterments, or equipment, chargeable to capital account.

Congress has taken, as the basis for determining a fair return for the railroads, the aggregate value of the railway properties in each group held

for and used in the service of transportation. In making a tentative finding of the value of the railway properties in each group, for the purposes of our report, we included all the railway property of each carrier held for and used in the service of transportation. This should not be construed as holding that jurisdiction over intrastate rates and fares has been taken away from the states and reposed in us. We find nothing in the law to indicate that such was the intent of Congress. But Congress has directed that we allow rates that will yield in the aggregate a return of 5½ or 6 per cent upon the value of the railway property in each of the groups. There can be no doubt of the power of Congress to devise and provide for carrying into effect a plan for assuring to the nation's interstate railroads a fair return upon the value of their property; and the full control by Congress of this matter is not to be denied on the ground that the carriers' aggregate earnings are a commingling of intrastate revenue and interstate revenue. In *The Minnesota Rate Cases*, 230 U. S., 399, the Supreme Court said:

> "This reservation to the States manifestly is only of that authority which is consistent with and not opposed to the grant to Congress. There is no room in our scheme of government for the assertion of state power in hostility to the authorized exercise of Federal power. The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the

936 commingling of interstate and intrastate operations. This is not to say that the Nation may deal with the internal concerns of the State, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective
937 government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere."

The record shows that the refusal of the state of New York to permit the carriers to increase the
938 rates and fares here in controversy to the extent approved by us is costing the railroads between $11,000,000 and $12,000,000 annually. In other words, the annual earnings of the interstate carriers operating in New York are now between $11,000,000 and $12,000,000 less than they would be if the general level of rates and fares approved
939 by us had become effective on intrastate traffic; and to that extent the declared purpose of Congress is defeated by a preferential basis of rates and fares maintained by authority of the State of New York.

This proceeding presents a practical question which we have endeavored to deal with in a practical way. The needs of these interstate carriers
940 for revenue to enable them to provide adequate transportation service and facilities are immediate and, in the interest of the public, can not be permitted to await the consideration in detail of individual fares, charges, and rates. The record shows that the respondent carriers perform the

services here in question under substantially similar circumstances and conditions, whether in respect of interstate or intrastate transportation; and that the lower basis of intrastate fares, charges, and rates results in undue prejudice against interstate passengers and shippers and unjust discrimination against interstate commerce. The present record warrants the findings hereinafter made. Those findings are without prejudice to the right of the authorities of the State of New York or of any other interested party, to apply in the proper manner for a modification of our findings and order as to any fares, charges, or rates on the ground that the latter are not related to the interstate fares, charges, or rates in such a way as to contravene the provisions of the Interstate Commerce Act.

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Passenger Fares.

The record leaves no doubt as to the unduly preferential character of the intrastate fares and charges now in effect in the State of New York. Interstate passenger fares are in general on a basis of 3.6 cents per mile as maximum. Passengers traveling between points in the State of New York and points in other states may be required to pay 3.6 cents per mile, whereas passengers traveling within the State of New York pay only 3 cents per mile. The basis of 3.6 cents applies on intrastate traffic in every state bordering on the State of New York. In other words, intrastate passengers in New York enjoy a basis of fares distinctly lower than those exacted of interstate travelers in the same territory, often riding

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946 in the same trains, and also lower than the fares paid by intrastate passengers in neighboring states. The record shows beyond question that there are no transportation conditions in the State of New York that justify lower rates or fares, on the whole, than those applicable in neighboring states, or lower than the interstate
947 rates and fares between points in New York and points in other states.

The situation is well illustrated by the fares between New York City and Buffalo. Of the several available routes connecting these points that over the New York Central is intrastate while the others are interstate. Exclusive of war taxes it
948 appears that since August 26, 1920, the fare has been $14.27 over the interstate routes and $13.16 over the New York Central, a difference of $1.11 in favor of the passenger using the latter route. In the case of a passenger occupying a lower Pullman berth the difference is increased to $2.36. Moreover, a passenger traveling from New York
949 City to a point west of Buffalo can, by buying a ticket to Buffalo over the New York Central and buying another ticket at Buffalo to his destination, defeat the through interstate fare. Representatives of the carriers stated that the inevitable result of this situation would be the reduction of the interstate fare from New York to Buffalo
950 to the level of the intrastate fare, and that this would tend to disrupt the entire fabric of the interstate passenger fares in the territory involved.

Inasmuch as the excess-baggage charges are arranged upon a scale bearing a fixed relationship to passenger fares and correspondingly graded in

amount, such charges are governed by the passenger fares, and any discrimination in passenger fares would necessarily involve a discrimination in excess-baggage charges. This statement concerning the manner in which the baggage charges are determined is based upon the schedule of rates and charges of the carriers now on file in the Commission's office. 951 952

Rates on Milk and Cream.

The expression "milk and cream" as used herein includes milk, cream, skim milk, buttermilk, condensed milk, evaporated milk, and pot cheese, and for the purpose of indicating the effect upon interstate commerce and upon the revenues of carriers, of the discrimination under consideration, we give illustrations as follows: 953

The New York Central Railroad Company operates nine milk trains daily into the New York City district, carrying 1,300,000 quarts of milk and cream, of which approximately 75 per cent is shipped over intrastate routes and approximately 25 per cent over interstate routes. 954

Nine or ten carloads of milk and cream per day originate on the Ulster & Delaware Railroad, which extends from Kingston, N. Y., northwesterly to Oneonta, 107 miles. The cars are delivered to the New York Central at Kingston and, together with six or seven cars originating on a branch of the latter carrier extending southwesterly from Kingston, are there formed into a milk train which moves to New York over the tracks of the West Shore line. This route runs through a part of the State of New Jersey, the West Shore 955

956 terminals being at Weehawken, N. J., and is therefore an interstate route. Shipments of milk and cream also originate at points along the east side of the Hudson in territory not far distant from that served by the Ulster & Delaware and move to New York over the intrastate route of
957 the New York Central along the east bank of the Hudson River. On shipments using the interstate route the rates charged are 20 per cent higher than those over the intrastate route, although there is no justification from a transportation viewpoint for a difference in the rates.

Again, a milk train is operated by the Delaware
958 & Hudson Railroad from Eagle Bridge, N. Y., which is northeast of Troy, in a northerly direction, a distance of 52 miles, to Castleton, Vt., thence southwesterly to Troy, N. Y., where it is delivered to the New York Central. Between Eagle Bridge and Castleton this train crosses the state line three times and again shortly after leav-
959 ing Castleton for Troy. All shipments received before the last crossing of the State line are interstate shipments, and others intrastate shipments. On milk and cream in this train which happens to cross a state line charges must be paid substantially in excess of those applying on intrastate shipments moving in the same train.
960 There is no doubt that shipments of milk and cream originating in western Vermont and shipped to New York City district over interstate routes are in direct competition with shipments of the same commodities originating in the eastern part of the State of

New York and moving to the New York City district over intrastate routes. 961

Furthermore, there is a substantial portion of the State of New York, which embraces, generally speaking, the central portion of the state, from which milk and cream may move to the New York City district over either interstate routes or intrastate routes. For the purpose of illustration we 962
may refer to the line of the New York Central extending from Albany to Syracuse with a branch line extending from Syracuse southeasterly to Earlville, and to the line of the Delaware & Hudson from Binghamton to Albany. From this whole territory shipments of milk and cream may move 963
to the New York City district over intrastate routes. From the same general territory, however, shipments may move over the interstate routes of the New York, Ontario & Western, the Delaware, Lackawanna & Western, and the Lehigh Valley railroads. Each of these roads has one or more points of contact with the New York 964
Central's main line between Utica and Syracuse and with its branches in that territory. Shipments moving over the interstate routes now pay charges 20 per cent higher than those charged for shipments from substantially the same territory moving over intrastate routes.

The rates on milk and cream to the New York City district have been considered by us at various times. In *Milk and Cream Rates to New York City*, 45 I. C. C., 412, we found that the interstate rates on this traffic were unreasonable and unduly prejudicial to shippers from near-by points and unduly preferential of shippers from distant 965

966 points; and we prescribed a scale of mileage rates, in blocks of 10 miles each, for distances up to 630 miles. The prescribed basis was also adopted by the New York Central on intrastate traffic, resulting in a uniform scale of rates over interstate and intrastate routes. By the application of the 20 per cent increase to interstate rates without a
967 corresponding increase in intrastate rates, this uniformity has been destroyed.

COMMUTATION FARES.

The record contains comparatively little evidence on the subject of commutation fares, but so
968 far as it goes it discloses facts in the presence of which we can not presume that the existing rate structure is just and reasonable in its established relationships and that it should be adopted as the basis upon which a general advance should be authorized, as in the foregoing particulars. We shall, therefore, reserve for future consideration
969 this branch of the case, and as to it we do not now make any finding or enter any order, but we shall keep the case open for further investigation, limited to the subject of commutation fares and commutation baggage charges in the State of New York as to the question whether they cause any undue or unreasonable advantage, preference, or
970 prejudice as between persons or localities in intrastate commerce on the one hand, and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce.

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FINDINGS.

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Subject to the above reservation in the matter of commutation fares and commutation baggage charges, we are of the opinion and find that the increases made by the carriers under Ex Parte 74, relating to passenger fares and baggage charges, and now in effect, result in reasonable 972
passenger fares and baggage charges for interstate transportation within the territory involved in this proceeding, and that the failure of the carriers within the State of New York to increase the standard intrastate fares and charges correspondingly has resulted in the past and will result in the future: In intrastate fares and charges 973
lower than the corresponding interstate fares and charges; in undue prejudice to persons traveling in interstate commerce within the State of New York and between points in the State of New York and points in other states; in undue preference and advantage to persons traveling intrastate in New York, and in unjust discrimination 974
against interstate commerce.

We further find that said undue prejudice and unjust discrimination should be removed by making increases in said intrastate passenger fares and baggage charges which shall correspond with the increases heretofore made as aforesaid in interstate passenger fares and baggage charges.

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We further find that the increases made by the carriers under Ex Parte 74, relating to space occupied by passengers in sleeping and parlor cars, result in reasonable charges for the occupancy of such space by passengers traveling in interstate

976 commerce in the territory involved in this proceeding, and that the failure of the carriers within the State of New York to increase correspondingly the charges for like space for passengers traveling in intrastate commerce has resulted in the past and will result in the future: In intra-
977 state charges lower than the corresponding interstate charges; in undue prejudice to persons traveling in interstate commerce within the State of New York and between points in the State of New York and points in other states; in undue preference and advantage to persons traveling intrastate in New York, and in unjust discrimination
978 against interstate commerce.

We further find that said undue prejudice and unjust discrimination should be removed by making increases in said intrastate charges which shall correspond with the increases heretofore made as aforesaid in interstate charges.

We further find that the increases made by the
979 carriers under Ex Parte 74, relating to rates on milk and cream, and now in effect, result in reasonable rates on milk and cream for interstate transportation within the territory involved in this proceeding, and that the failure of the carriers within the State of New York to increase the intrastate rates on milk and cream correspondingly has resulted in the past and will result in the fu-
980 ture: In intrastate rates lower than the corresponding interstate rates; in undue prejudice to shippers of milk and cream in interstate commerce within the State of New York and between points in the State of New York and points in other states; in undue preference and advantage

to shippers of milk and cream in intrastate commerce in New York, and in unjust discrimination against interstate commerce. 981

We further find that said undue prejudice and unjust discrimination should be removed by making increases in said intrastate rates on milk and cream which shall correspond with the increases heretofore made as aforesaid in the rates on milk and cream shipped in interstate commerce. 982

We further find that, whether the aforesaid passenger fares, baggage charges, surcharges, or rates on milk and cream pertain to transportation in interstate commerce or to transportation in intrastate commerce, the transportation services, in each instance, are performed by the carriers under substantially similar circumstances and conditions. 983

An appropriate order will be entered.

EASTMAN, Commissioner, dissenting:

I am unable to join in the decision of the majority, because I believe it goes beyond our lawful power. The objection is more than technical, for it concerns the basic relations between the state and federal governments, a matter of great moment. 984

In essence, the carriers' position is that when we authorize an increase in interstate rates under section 15 (a) of the Interstate Commerce Act a corresponding increase must be made in intrastate rates; otherwise unjust discrimination against interstate commerce results which it is our duty under section 13 to correct. State com- 985

missions may be asked to authorize the intrastate increases, but they need be offered no evidence except the fact of our decision and have no real discretion. The carriers accept the logical consequence of this view, if I understand them correctly, by holding that applications to the State commissions are in substance a matter of courtesy and that we could, under section 13, either upon complaint or upon our own motion, prescribe the intrastate rates desired even if no such applications had been made. If this be so, it follows that we could practically at will deprive any or all of the states of authority over intrastate rates, for when such rates are once prescribed by our order under section 13 they can not thereafter be changed without our consent.

The record in the instant case is based upon and conforms to this general theory of our power, and it is the only theory, it seems to me, upon which the decision of the majority can in full measure be supported. I am unable to believe that it is sound.

The Supreme Court of the United States has said:

> In construing federal statutes enacted under the power conferred by the commerce clause of the Constitution the rule is that it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a State, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested. *Illinois Central R. R.* v. *Public Utilities Commission*, 245 U. S., 493, 510.

It is in the light of this wise and salutary rule that we should approach the issue before us, con-

991 struing the provisions of the act with scrupulous respect for State authority. It is, I think, our duty to conclude that when the Congress expects us to exercise new powers at the expense of the states, we shall be told to do so in plain and unmistakable terms.

992 In defining our jurisdiction, at the very beginning of the Interstate Commerce Act, paragraph 2 of section 1, states that the provisions of the act shall not apply —

> To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State and not shipped to or from a foreign country from or to any place in the 993 United States as aforesaid.

The language is unequivocal, and there is no subsequent provision which runs counter to the limitation. It is interstate and not intrastate transportation with which the act has to do. Under paragraph 4 of section 13 it is true that we 994 may prescribe intrastate rates, but only for the purpose of removing unjust discrimination against interstate commerce. Plainly this power springs from and is merely an incident of the duty to regulate and protect interstate traffic.

Turning to section 15(a), our duty to establish rates which will enable carriers to earn a fair re- 995 turn upon the aggregate value of their railway property relates and is confined to *interstate* rates. Without regard to the limitation of section 1, there is no " clearly manifested purpose " to extend our authority over intrastate rates, and certainly there is none in view of this limitation.

996 Nor is such a conclusion inconsistent with a reasonable interpretation and practical application of this section. A rule is laid down for our guidance, but our duty is confined to interstate rates and it is a duty merely to maintain such rates at the level which will yield the return de-
997 sired, assuming that the states will exercise their own power justly and taking into consideration our right to correct intrastate rates which unjustly discriminate against interstate commerce.

At this point we may consider for a moment whether or not there is reason to believe that the Public Service Commission of New York is disposed to deal justly with the carriers. Following
998 our decision in *Increased Rates, 1920, supra,* applications were filed with that commission for authority to make like increases in intrastate rates, fares, and charges. With a few minor exceptions the freight increases sought were permitted at once to become effective, as was possible under
999 the state statutes, without indication of approval or disapproval and subject to complaint or investigation in the future. The situation was different as to passenger fares. By a provision of the New York law these are limited to a maximum of 3 cents per mile, but the State commission pointed out that it could permit fares in excess of this limit upon a showing that existing fares were in-
1000 sufficient to afford reasonable compensation for the service rendered. Notwithstanding this intimation the carriers offered no evidence and did not assert that the fares were insufficient, but relied upon the fact that we had permitted an increase of 20 per cent in the interstate fares.

Under the circumstances no course seemed open 1001
to the New York commission except to deny the application, and this it did upon the sole ground of lack of evidence.

There is no basis for a belief that the New York commission is disposed to deal other than justly with the carriers, or that it would have 1002
been unduly exacting if they had undertaken to show insufficiency of compensation. Upon the facts before us and in a spirit of comity the carriers might well be remitted to the State tribunal to exhaust their remedies before coming to us for action which will deprive the State of all authority over intrastate fares so long as our order remains in effect. In this view of the matter what- 1003
ever losses in revenue the carriers may have suffered are chargeable to their own default.

But approaching the matter solely from the viewpoint of our own jurisdiction, it is clear, I think, that for such authority as we possess over intrastate rates we must now look to the provisions of section 13. The question at once arises 1004
whether by reason of this section we have an essentially different issue before us than has frequently been considered under section 3 of the act to regulate commerce in so-called "Shreveport cases." The carriers assert that the issue is different because section 13 not only prohibits "any undue or unreasonable advantage, prefer- 1005
ence, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand," but also prohibits "any undue, unreasonable, or unjust discrimination against interstate or for-

1006 eign commerce." Their view, as I understand it, is that the word " discrimination " in this latter phrase is equivalent to the word " burden," and that the effect is to prohibit what was not prohibited by section 3, namely, an unduly low level of rates within the State which is yet not alleged or 1007 shown to be unduly preferential of or unduly prejudicial against any particular person or community.

This conclusion I find it difficult to accept. Upon protest the conference committee of the Senate and House of Representatives struck from section 13 the words " undue burden " and wrote in their place the words " undue, unreasonable, or 1008 unjust discrimination," which now are there. I hesitate to believe, as the carriers urge that no change in meaning was intended or accomplished by this change in words. Moreover, in speaking of section 3 of the act to regulate commerce in the consideration of the original *Shreveport* case, the Supreme Court of the United States said:

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> It is apparent from the legislative history of the act that the evil of discrimination was the principal thing aimed at, and there is no basis for the contention that Congress intended to exempt any discriminatory action or practice of interstate carriers affecting interstate commerce which it had authority to reach. (*Houston East & West Texas Ry.* 1110 *Co.* v. *United States*, 234 U. S., 342, 356).

Surely this language is quite as broad as the words in section 13 to which our attention is now directed.

If the issue before us is not essentially different from the issue which has been considered in prior

1011 "Shreveport cases," it will, I think, be conceded that while the evidence may be sufficient to justify action against certain intrastate fares and charges, it is not sufficient to justify the all-embracing action which the majority approve. This is indicated by the fact that the carriers have not seen fit to rely upon preference to persons or com- 1012 munities, none of which are complaining, but have rested their case chiefly upon the allegation that the intrastate rates are upon a lower level than the interstate and fail to contribute their fair share of the railway operating income to which we have found that the carriers in the eastern group are entitled. For the reasons above stated I doubt our power to change State rates upon this ground. 1013 It falls nothing short of an appellate power to substitute our judgment as to the reasonableness of such rates for the judgment of the States. But assuming that we possess this power, is the evidence sufficient to justify us in exercising it?

Stating the question differently, is there evidence that the intrastate fares and charges in 1014 question are not producing their fair share of railway operating income and, if they are not, that the percentage increase desired is necessary to bring them to the proper level? That is not, it seems to me, an inevitable conclusion from our decision in *Increased Rates, 1920, supra,* and in this connection it is desirable to understand 1015 clearly the purport and effect of that decision. We were there faced with the necessity of providing without delay the additional revenue needed to bring the aggregate income of the carriers to the level prescribed by the act, and we adopted

1016 the expedient of authorizing horizontal percentage increases in rates, fares, and charges within and between certain territorial groups. This expedient was necessary, for any detailed consideration of individual rates was impracticable in the time available. Nevertheless, it should be noted that the act does not prescribe this method of in-
1017 creasing rates, that our duty under section 15(a) is a continuing duty, and that our finding was only that the method employed would "result in rates not unreasonable in the *aggregate.*" It rested upon the assumption that extensive readjustment would probably be necessary. It is not equivalent to a finding that individual rates, fares,
1018 and charges, or classes of rates, fares, and charges, so increased and now in effect, are just and reasonable. Still less does it follow as a necessary conclusion, where State authority is involved, that the passenger fares within any particular state must be increased 20 per cent in order to produce their fair share of railway oper-
1019 ating income. But if our decision in *Increased Rates, 1920,* is not evidence of that fact, certainly there is no other evidence of record upon which such a conclusion can be based.

No doubt it may be unnecessary that the individual fares and charges within the State should all be considered separately or that the value of
1020 the property used in the intrastate transportation should be established and the return now earned upon that value estimated by elaborate computations. But I am unable to escape the conclusion that even if the theory of the carriers as to our power under section 13 be accepted, at least it

should be shown, by evidence sufficient to justify 1021
a valid opinion, that the intrastate fares and charges in question are not now furnishing adequate compensation for the service rendered judged by the standard which the Congress has set forth, and that an increase of 20 per cent is necessary to this end.

Summing the matter up, without going into 1022
further detail, I am of the opinion that upon the record before us the decision of the majority involves the exercise of a power which goes beyond any "clearly manifested purpose" of the Congress, and which we ought not to attempt to exercise until it is conferred upon us in plain and unmistakable terms. Nor would such a conclusion 1023
leave the carriers without a remedy, if they are prepared to bring the necessary evidence to the attention of the New York Commission.

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ORDER.

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 13th day of November, A. D. 1920.

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In the Matter of Rates, Fares, and Charges of THE NEW YORK CENTRAL RAILROAD COMPANY and OTHER RAILROAD COMPANIES in the State of New York.	No. 11623.

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This case being a proceeding instituted by the Commission upon petition filed, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission, on the date hereof, having made and filed a report containing
1029 its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the common carriers who are parties to this proceeding, namely, Skaneateles Railroad Company; Norwood & St. Lawrence
1030 Railroad Company; Middletown & Unionville Railroad Company; Grasse River Railroad Corporation; Dansville & Mount Morris Railroad Company and A. S. Murray, receiver; Massena Terminal Railroad Company; Sterling Mountain Railway Company; West Shore Railroad Com-

pany (The New York Central Railroad Company, lessee); Rutland Railroad Company; The New York, Chicago & St. Louis Railroad Company; The New York Central Railroad Company; The Michigan Central Railroad Company; Lehigh Valley Railroad Company; Fulton Chain Railway Company; The Delaware, Lackawanna & Western Railroad Company; Boston & Maine Railroad; Boston & Albany Railroad Company (The New York Central Railroad Company, lessee); The Lehigh & Hudson River Railway Company; Fonda, Johnstown & Gloversville Railroad Company; Central New York Southern Railroad Corporation; Buffalo & Susquehanna Railroad Corporation; Arcade & Attica Railroad Corporation; Prattsburgh Railway Corporation; Pere Marquette Railway Company; Genesee & Wyoming Railroad Company; New Jersey & New York Railroad Company; Grand Trunk Railway Company of Canada; Erie Railroad Company; Central Vermont Railway Company; Bath & Hammondsport Railroad Company; The Staten Island Rapid Transit Railway Company; Lehigh & New England Railroad Company; The Baltimore & Ohio Railroad Company; The Pennsylvania Railroad Company; The Long Island Railroad Company; The New York, New Haven & Hartford Railroad Company; Buffalo, Rochester & Pittsburgh Railway Company; Adirondack & St. Lawrence Railroad Company; The Ulster & Delaware Railroad Company; Niagara Junction Railway Company; New York, Ontario & Western Rail-

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way Company; Unadilla Valley Railway Company; The Pittsburgh, Shawmut & Northern Railroad Company and F. S. Smith, receiver; Marcellus & Otisco Lake Railway Company; Lake Champlain & Moriah Railroad Company; Delaware & Northern Railroad Company; Wabash Railway Company; Napierville Junction Railway Company; Greenwich & Johnsonville Railway Company; The Delaware & Hudson Company; The Central Railroad Company of New Jersey; The Lowville & Beaver River Railroad Company; New York & Pennsylvania Railway Company; Catskill Mountain Railroad Corporation; Central New England Railway Company; Deer River Railroad Company; Dexter & Northern Railroad Company; Glenfield & Western Railroad Company; Marion Railway Corporation; Middleburg & Schoharie Railroad Company; New York Connecting Railroad Company; Raquette Lake Railway Company; and Schoharie Valley Railway Company, according as they respectively participate in the transportation, be, and they are hereby, notified and required to cease and desist from practicing the undue prejudice, undue preference and advantage, and unjust discrimination, found in said report to exist, and to establish, put in force, and maintain passenger fares and baggage charges for the transportation of passengers and their baggage in intrastate commerce within the State of New York which shall exceed the fares and charges of the carriers now in force and applicable to such transportation in amounts

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corresponding to the increases heretofore made by the carriers, now in effect, under Ex Parte 74, referred to in said report, in said carriers' passenger fares and baggage charges for the transportation of passengers and their baggage in interstate commerce within the State of New York 1042
and between points in the State of New York and points in other states;

It is further ordered, That said carriers, according as they respectively participate in the transportation, be, and they are hereby, notified and required to cease and desist from 1043
practicing the undue prejudice, undue preference and advantage, and unjust discrimination found in said report to exist, and to establish, put in force, and maintain charges for space in sleeping cars and in parlor cars occupied by passengers traveling in intrastate commerce within the State of New York which shall exceed the charges of the 1044
carriers now in force and applicable to the occupancy of such space in said transportation in amounts corresponding to the increases heretofore made by the carriers, under Ex Parte 74, in said carriers' charges for the occupancy of like space in sleeping cars and in parlor cars by passengers traveling in interstate commerce within 1045
the State of New York and between points in the State of New York and points in other states;

It is further ordered, That said carriers, according as they respectively participate in the transportation, be, and they are hereby, notified and required to cease and desist from practicing the

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undue prejudice, undue preference and advantage, and unjust discrimination found in said report to exist, and to establish, put in force, and maintain rates for the transportation of milk and cream in intrastate commerce within the State of New York which shall exceed the rates of the carriers
1047 now in force and applicable to such transportation in amounts corresponding to the increases heretofore made by the carriers, under Ex Parte 74, in said carriers' rates for the transportation of milk and cream in interstate commerce within the State of New York and between points in the
1048 State of New York and points in other states;

It is furthered ordered, That nothing contained herein shall be construed as either authorizing or requiring said carriers, or any of them, to change in any manner or to any extent the commutation fares, or any of the commutation fares, or charges upon excess baggage carried in connection with
1049 any of the commutation fares, of said carriers now in force and applicable to the transportation of passengers or to other transportation in intrastate commerce within the State of New York;

It is furthered ordered, That this order shall become effective on or before December 18, 1920,
1050 upon notice to this Commission and to the general public by not less than five days' filing and posting in the manner prescribed in section 6 of the interstate commerce act and remain in force until the further order of the Commission in the premises;

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Paper 5

And it is further ordered, That a copy of this order be served upon each of the common carriers who are parties to said proceeding.

By the Commission.

[SEAL] GEORGE B. McGINTY, *Secretary.* 1052

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PAPER 6

LOCATION AND LENGTH OF ROAD OPERATED WITHIN THE STATE OF NEW YORK, OPERATING STEAM RAILROAD CORPORATIONS

The roads are grouped under the name of the operating corporation into classes as follows: (A) Line owned by the operating corporation: (a) main line, (b) branches and spurs; (B) Line owned by corporation all of whose capital stock is held by the operating corporation; (C) Line operated under lease for a definite annual rent; (D) Line operated under contract or agreement, or where the rent is contingent on earnings or other consideration; (E) Line operated under trackage rights.

Class	Name of corporation and road operated	Termini of portion in New York State	Length of portion in New York State					
			Road or first main track	Second main track	Third main track	Other main tracks	Yard track, sidings, etc.	Total all tracks
			Miles	*Miles*	*Miles*	*Miles*	*Miles*	*Miles*
	Pennsylvania:							
C	Elmira and Williamsport	Elmira—State line	6.44	.34	.....	.....	4.88	11.66
D	Western New York and Pennsylvania	Buffalo—near Childs	85.84	.....	.....	.....	36.57	122.41
D	Western New York and Pennsylvania	Buffalo—near Bullis Mills	76.38	27.27	.....	.....	69.47	173.12
D	Western New York and Pennsylvania	Olean—near Corydon	38.08	.....	.....	.....	47.22	85.30
D	Western New York and Pennsylvania	Winchester—Blasdell	7.67	2.62	.....	.....	13.80	24.09
D	Western New York and Pennsylvania	Hinsdale—Rochester	98.40	.....	.....	.....	25.68	124.08
D	Western New York and Pennsylvania	Nunda Junction—Nunda	2.44	.....	.....	.....	1.07	3.51
D	Western New York and Pennsylvania	Scottsville—Garbutt	2.90	.....	.....	.....	.52	3.42
D	Western New York and Pennsylvania	Rochester—Lincoln Park	2.38	.....	.....	.....	5.34	7.72
D	Western New York and Pennsylvania	Olean—Empire tannery	1.15	.....	.....	.....	.57	1.72
D	Western New York and Pennsylvania	In city of Buffalo	2.32	1.67	.....	.....	33.16	37.15
D	Union Terminal R.R. of Buffalo	Mayville—Chautauqua	2.64	.....	.....	.....	.46	3.10
D	Jamestown, Westfield and Northwestern	Chemung Junction—Canandaigua	64.19	1.14	.....	.....	38.89	104.22
D	Elmira and Lake Ontario	Stanley—Sodus Point	34.06	.....	.....	.....	11.48	45.54
D	Elmira and Lake Ontario	Canandaigua Lake—Canandaigua	1.47	.....	.....	.....	.49	1.96
D	Elmira and Lake Ontario	Long Island City—State line	4.99	4.99	4.20	4.20	37.52	55.90
D	Pennsylvania Tunnel and Terminal	In city of Buffalo	.97	.94	.91	.87	5.28	8.97
E	New York Central	In city of Buffalo	3.98	3.91	1.49	.....	1.33	10.71
E	Buffalo Creek	In city of Buffalo	1.77	1.49	.....	.....	.17	3.43
E	Lehigh and Lake Erie	In city of Buffalo	11.18	11.15	.....	.....	1.40	23.73
E	Delaware, Lackawanna and Western	Parish street, Buffalo—State line	.60	.03	.....	.....	.28	.91
E	Grand Trunk	In city of Olean	.....	.....	.....	.....	1.19	1.19
E	Erie							

E	Pittsburg, Shawmut and Northern	In city of Olean					.09	.09	
E	Pittsburg, Shawmut and Northern	In city of Olean					.13	.13	
E	New York Central	At Gates					1.12	1.12	
E	Lincoln Park and Charlotte	At Gates	.30				.31	.61	
E	Buffalo, Rochester and Pittsburgh	At Gates					.34	.34	
E	New York, Chicago and St. Louis	In city of Dunkirk	.12	.09			.07	.28	
E	New York, Chicago and St. Louis	In city of Dunkirk	.10				.05	.15	
E	Buffalo, Rochester and Pittsburgh	Riverside Junction—State line	5.92	5.90				11.82	
E	Erie	Erie Junction—Chemung Junction	5.28	5.28			6.69	17.25	
	New York Central:								
Aa	Main line	Mott Haven Junction—near State Line	499.84	499.83	423.85	439.38	988.93	2851.83	
Ab	30th Street branch	Spuyten Duyvil—St. Johns Park	12.37	12.37			62.60	87.34	
Ab	Putnam branch	155th street, New York city—Putnam Junction	53.73	9.36			21.98	85.07	
Ab	Yonkers branch	Van Cortlandt—Yonkers	3.10	3.10			.19	6.39	
Ab	Mahopac Falls branch	Baldwin Place—Mahopac Falls	2.05				.26	2.31	
Ab	Tivoli Hollow branch	West Albany—Albany	1.24				1.08	2.32	
Ab	Schenectady Detour branch	Carman—South Schenectady	4.65	4.65			.79	10.09	
Ab	Troy and Schenectady branch	Schenectady—Troy	20.91				13.58	34.49	
Ab	Hoffman's Connection branch	Hoffman's—Rotterdam Junction	2.50	2.19				4.69	
Ab	Dolgeville branch	Little Falls—Dolgeville	10.00				2.82	12.82	
Ab	Adirondack branch	Herkimer—Malone Junction	173.33				49.76	223.09	
Ab	Hinckley branch	Prospect Junction—Hinckley	2.93				2.64	5.57	
Ab	Saranac branch	Lake Clear Junction—Saranac Lake	5.89				1.49	7.38	
Ab	Ottawa branch	Tupper Lake—Nyando	69.27				8.09	77.36	
Ab	Ogdensburg branch	Utica—Ogdensburg	134.32	10.02			73.14	217.48	
Ab	Clayton branch	Rivergate—Clayton	15.85				4.00	19.85	
Ab	Rome branch	Rome—Richland	45.31	4.36			25.73	75.40	
Ab	Rome, old line branch	Tower No. 34—Charles street, Rome	4.20	2.94			15.69	22.83	
Ab	Syracuse Junction branch	East Syracuse—Syracuse Junction	8.31	8.31	6.27		7.56	30.45	
Ab	Watertown branch	Syracuse—Massena Springs	160.93	52.91			116.49	330.33	
Ab	Phoenix branch	Woodard—Fulton	17.10	.21			3.82	21.13	
Ab	Ontario branch	Pulaski—Suspension Bridge	175.27	3.47			93.46	272.20	
Ab	Rochester branch	Windsor Beach—Rochester	7.27				3.69	10.96	
Ab	Sackets Harbor branch	Watertown Junction—Sackets Harbor	11.43				3.08	14.51	
Ab	Cape Vincent branch	Watertown Junction—Cape Vincent	24.10				18.47	42.57	
Ab	Carthage branch	Watertown—Newton Falls	63.39				25.58	88.97	
Ab	Sanfords branch	Main street, Watertown—Roots	5.21				5.19	10.40	
Ab	Oswegatchie branch	G. & O. Junction—Edwards	13.07				4.13	17.20	
Ab	DeKalb branch	DeKalb Junction—Ogdensburg	18.89				2.70	21.59	

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			Road or first main track	Second main track	Third main track	Other main tracks	Yard track, sidings, etc.	Total all tracks
	New York Central — *Continued:*		*Miles*	*Miles*	*Miles*	*Miles*	*Miles*	*Miles*
Ab	Auburn branch	Syracuse—Rochester	96.29	.....	.....	.....	62.12	158.41
Ab	Canandaigua branch	Canandaigua—Batavia	50.36	.....	.....	.....	12.92	63.28
Ab	Lyons—Newberry branch	Lyons—near Lawrenceville	85.67	81.25	.....	.....	88.63	255.55
Ab	Penn Yan branch	Dresden—Penn Yan	6.55	.....	.....	.....	3.88	10.43
Ab	Corning branch	Corning Junction—Corning	.75	.72	.....	.....	13.13	14.60
Ab	Falls branch	Rochester—Suspension Bridge	74.05	54.12	.....	.....	105.91	234.08
Ab	Charlotte branch	Rochester—Ontario Beach	7.43	6.92	.....	.....	10.97	25.32
Ab	Attica branch	Batavia—Attica	10.67	.....	.....	.....	1.38	12.05
Ab	Tonawanda branch	Batavia—North Tonawanda	35.44	1.67	.....	.....	9.41	46.52
Ab	Gardenville branch	Depew—Bay View	12.96	12.78	.....	.....	59.03	84.77
Ab	Buffalo Belt branch	Buffalo—North Buffalo Junction	7.23	7.22	.....	.....	29.41	43.86
Ab	Niagara branch	Buffalo—Lewiston	30.05	24.27	1.18	1.18	89.70	146.38
Ab	Lockport branch	North Tonawanda—Lockport Junction	11.18	.....	.....	.....	4.92	16.10
Ab	Valley branch	Dunkirk—near Fentonville	42.26	.....	.....	.....	7.64	49.90
B	Cornwall Bridge Co	Niyando—International Boundary	.18	.....	.....	.....	.....	.18
C	West Shore	Buffalo—near Tappan	404.84	404.80	15.36	.....	341.39	[1]1166.39
C	Rockland Lake branch	Congers—Rockland Lake	1.17	.....	.....	.....	.63	1.80
C	Albany branch	Ravena—Kenwood Junction	11.55	.....	.....	.....	2.27	13.82
C	Chenango branch	Syracuse—Earlville	42.70	.....	.....	.....	13.02	55.72
C	New York and Harlem	New York city—Chatham	127.36	54.76	12.51	12.51	122.23	329.37
C	Port Morris branch	New York city—Port Morris	1.83	1.49	.....	.....	6.87	10.19
C	Lake Mahopac branch	Goldens Bridge—Lake Mahopac	7.22	.....	.....	.....	2.24	9.46

C	Wallkill Valley	Kingston—Montgomery	32 88						7 49		40 37	
C	Troy and Greenbush	Rensselaer—Troy	5 56	5 56					11 98		23 10	
C	Genesee Falls	N. Y. C. main line—Breweries, Rochester							2 11		2 11	
C	Boston and Albany	State line—Rensselaer	37 85	37 85	24 25				31 28		131 23	
C	Hudson and Chatham	Chatham—Hudson	17 12	95					10 12		28 19	
C	St. Lawrence and Adirondack	Malone Junction—International Boundary	10 25								19 27	
D	Dolgeville and Salisbury	Dolgeville—Irondale	3 70						9 02		6 10	
E	Delaware and Hudson	Albany—Troy	7 34	7 34					2 40		14 68	
E	Delaware and Hudson	Saranac Lake—Lake Placid	10 08								10 08	
E	Delaware and Hudson	Kenwood Junction—Albany	1 71	70							2 41	
E	New York, Ontario and Western	Fulton—Oswego	12 23								12 23	
E	Rutland	Norwood—Malone Junction	37 10								37 10	
E	Rutland	At Mohrs	15								15	
E	Buffalo Creek	In city of Buffalo	3 56	3 46	95						7 99	
E	Erie	Montgomery—Campbell Hall	4 78								4 78	
E	Troy Union	In city of Troy	2 03	2 00							4 03	
Aa	**New York, New Haven and Hartford:** New York, New Haven and Hartford	Woodlawn Junction—Connecticut State line	14 06	14 04	14 03	13 24			15 99		71 36	
C	Harlem River and Port Chester	Harlem River—New Rochelle	11 27	11 24	10 75	30 06			160 84		164 19	
E	New York Central	Woodlawn Junction—Grand Central Terminal	11 94	11 99	11 84	11 95			39 42		87 14	
	Erie:											
Aa	Erie	Piermont—Dunkirk	404 48	294 39	10	06			315 07		1014 10	
Ab	Newburgh and New York	Arden Junction—Vail's Gate Junction	12 64	3 79					2 27		18 70	
Ab	Newburgh branch	Greycourt—Newburgh	18 73	6 33					15 61		40 67	
Ab	Buffalo branch	Hornell—Buffalo	92 16	92 16					133 52		317 84	
Ab	Buffalo, New York and Erie	Painted Post—Attica (via Avon)	109 01						30 89		139 90	
Ab	Suspension Bridge and Erie Junction	East Buffalo—Suspension Bridge	24 01	6 31					27 94		58 30	
Ab	Buffalo and Southwestern	Buffalo Creek Junction—Jamestown	66 35	61					19 83		86 80	
Ab	Branch Road	International Junction—International Bridge	4 50	4 50					7 32		16 32	
Ab	Erie and Jersey	Highland Mills—Guymard	38 60	38 60					1 30		78 50	
Ab	Genesee River	Hunts—Cuba	32 60						7 19		39 79	
B	Buffalo, Bradford and Pittsburgh	Carrollton—Pennsylvania State line	7 84						5 19		13 03	
B	Conesus Lake	Conesus Lake—Lakeville	1 61						.46		2 07	
B	Erie and Black Rock	Black Rock Junction—Black Rock	1 14						3 85		4 99	
B	Nypano	North East Junction—State line	1 50						.70		2 20	
C	New York, Pennsylvania and Ohio	Salamanca—Niobe	49 30	37 09					27 94		114 37	

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			Miles	*Miles*	*Miles*	*Miles*	*Miles*	*Miles*
	Erie — *Continued:*							
C	Elmira State Line	State Line Junction—Pennsylvania-State line	6.51	.....	.....	.....	1.87	8.38
		Crawford Junction—Pine Bush	10.22	.....	.....	.....	1.05	1.27
C	Middletown and Crawford	New York state line—Nyack	7.10	2.68	.....	.....	1.71	11.49
C	Nyack and Northern	New York state line—Suffern	.85	.85	.85	.85	.01	3.41
C	Union	Goshen—Montgomery	10.43	.....	.....	.....	2.70	13.13
C	Montgomery and Erie	Goshen—Pine Island	11.64	.....	.....	.....	2.59	14.23
C	Goshen and Deckertown	Avon—Rochester	18.40	.....	.....	.....	8.29	26.69
C	Rochester and Genesee Valley	Avon—Mount Morris	15.35	.....	.....	.....	3.01	18.36
C	Avon, Geneseo and Mount Morris	Southport Junction—State Line Junction	2.31	.....	.....	.....	.....	2.31
E	Northern Central	Crawford Junction—Middletown	3.30	.....	.....	.....	.....	3.30
E	New York, Ontario and Western							
	Boston and Maine:							
C	Fitchburg	Rotterdam Junction—Vermont-State line	54.74	26.98	.....	.....	67.78	149.50
C	Fitchburg	Troy—Vermont-State line	34.10	15.55	.....	.....	9.32	58.97
C	Fitchburg	Mechanicville—Saratoga Springs	17.50	.....	.....	.....	3.39	20.89
C	Fitchburg branch	Schuyler Junction—Schuylerville	8.32	.....	.....	.....	1.38	9.70
C	Fitchburg branch	Hoosick Junction—Vermont-State line	5.04	.....	.....	.....	1.36	6.40
C	Troy and Bennington	In city of Troy	2.03	2.00	.....	.....	.....	4.03
E	Troy Union	Mechanicville—Crescent	.....	6.94	.....	.....	.....	6.94
E	Delaware and Hudson							
	Delaware, Lackawanna and Western:							
A	Harbor Terminal	In city of Brooklyn	.....	.....	.....	.....	1.33	1.33

C	Syracuse, Binghamton and New York	Binghamton—Syracuse	80.95	36.55	.....	.....	56.29	173.79
C	Erie and Central New York	Cortland Junction—Cincinnatus	18.31	.....	.....	.....	1.45	19.76
C	New York, Lackawanna and Western	Binghamton—Buffalo	208.06	206.85	..	.....	224.38	639.29
C	Oswego and Syracuse	Syracuse—Oswego	34.98	.....	.....	.....	29.57	64.55
C	Cayuga and Susquehanna	Susquehanna River—Ithaca	34.37	.....	.....	.....	6.61	40.98
C	Valley	Binghamton—Pennsylvania-State line	11.10	11.10	.....	.....	12.29	34.49
C	Utica, Chenango and Susquehanna Valley	Greene—Utica—Richfield Springs	97.41	.....	.....	.....	40.58	137.99
C	Greene	Chenango Forks—Greene	8.10	.....	.....	.....	1.02	9.12
E	New York, Ontario and Western	In city of Utica	.20	.....	.....	.....	.....	.20
	Lehigh Valley:							
B	Lehigh-Buffalo Terminal Ry. Corp	In city of Buffalo	.68	.68	.....	.....	4.56	5.92
C	Lehigh Valley Railway	State Line to Buffalo	177.73	175.17	15.82	.....		
C	Waverly branch	State Line near Sayre	.41	.....	.....	.....		
C	Ithaca branch	Van Etten Junction to Geneva Junction	59.49	1.03	.....	.....		
C	Naples branch	Geneva to Naples	29.43	.....	.....	.....		
C	Rochester branch	Rochester to Hemlock	29.08	.....	.....	.....	336.14	1,063.03
C	Niagara Falls branch	Niagara Junction to Tonawanda Junction	10.56	10.39	.....	.....		
C	Lehigh and Lake Erie branch	Tifft Farm Junction to Tifft Farm	10.93	10.23	.....	.....		
C	Elmira and Cortland branch	Elmira — Camden	139.14	.....	.....	.....		
C	Auburn and Ithaca branch	Auburn—Ithaca	42.46	.....	.....	.....		
C	Cayuga branch	Cayuga Junction—Cayuga	4.40	.....	.....	.....		
C	Seneca Falls branch	L. V. Junction—Geneva Junction	10.59	.....	.....	.....		
C	Lehigh Valley R.R. Co. of N. J.	Yard at 27th street in New York City	.....	.....	.....	.....	1.41	1.41
C	Lehigh and New York	North Fair Haven—Pennsylvania-State line	115.37	.....	.....	.....	38.21	153.58
C	New York Central	At Suspension Bridge	.....	.....	.....	.....	12.65	12.65
D	Hayt's Corners' Ovid and Willard	Hayt's Corners—Willard	2.98	.....	.....	.....	.20	3.18
E	Western New York and Pennsylvania	In city of Buffalo	.34	.....	.....	.....	.....	.34
E	New York Central	Tonawanda Junction—Suspension Bridge	14.96	14.29	.....	.....	.....	29.25
E	New York Central	At Cayuga	2.14	.....	.....	.....	.....	2.14
E	New York Central	Wonalancet branch near Tonawanda	8.25	.....	.....	.....	.....	8.25
E	New York, Ontario and Western	At Sylvan Junction	.10	.....	.....	.....	.....	.10
E	Erie	At Waverly	.....	.....	.....	.....	1.52	1.52
	Delaware and Hudson:							
Aa	Delaware and Hudson	Lake Station, Whitehall—Rouses Point Junction	112.93	4.67	.....	.....	47.94	165.54
Aa	Delaware and Hudson	Canada Junction—New York-Canada line	12.78	.....	.....	.....	.81	13.59
Aa	Delaware and Hudson	South Junction—Ausable Forks	18.87	.....	.....	.....	4.66	23.53
Aa	Delaware and Hudson	Saratoga Springs—North Creek	56.68	.....	.....	.....	11.38	68.06
Aa	Delaware and Hudson	Glenville—Coons	9.68	2.85	.....	.....	2.32	14.85
Aa	Delaware and Hudson	Schenectady—Delanson	14.15	14.37	.....	.....	5.26	33.78

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	Delaware and Hudson — *Continued:*		*Miles*	*Miles*	*Miles*	*Miles*	*Miles*	*Miles*
Aa	Delaware and Hudson	Cherry Valley Junction—Cherry Valley	21.04				1.82	22.86
Aa	Delaware and Hudson	Nineveh—State line	17.65	4.17			8.75	30.57
Ab	Delaware and Hudson	Montealm Landing—Baldwin	4.77				1.31	6.08
Ab	Delaware and Hudson	Salem Junction—Greenwich	10.20				.83	11.03
Ab	Delaware and Hudson	Moreau Junction—South Glens Falls	4.77					4.77
Ab	Delaware and Hudson	Thurman—Warrensburgh	3.40					3.40
C	Albany and Vermont	Albany—Waterford Junction	12.11	12.18				
C	Rensselaer and Saratoga	Waterford Junction—Ballston	18.77	19.55				
C	Saratoga and Schenectady	Ballston—Saratoga Springs	7.53	6.68			153.76	341.95
C	Rensselaer and Saratoga	Saratoga Springs—Whitehall—Vermont State line	47.36	39.20				
C	Saratoga and Schenectady	Schenectady—Ballston	14.12	4.66				
C	Rensselaer and Saratoga	Waterford Junction—Troy	5.60	.43				
C	Rensselaer and Saratoga	Eagle Bridge—Vermont-State line	32.62				9.15	41.77
C	Rensselaer and Saratoga	Fort Edward—Lake George	14.46				18.01	32.47
C	Rensselaer and Saratoga	Watervliet Junction—Green Island	1.08	1.06			.66	2.80
C	Albany and Susquehanna	Albany—Binghamton	142.59	95.33			158.00	395.92
D	Chateaugay and Lake Placid	Dannemora—Lake Placid	63.19				26.62	91.81
D	Plattsburgh and Dannemora	Bluff Point—Dannemora	16.25				9.44	25.69
D	Ticonderoga	Ticonderoga Junction—Ticonderoga	.92				3.39	4.31
	New York, Chicago and St. Louis:							
Aa	Main line	Buffalo—Silver Creek: Dunkirk—State line	60.23				38.76	98.99

C	New York Central	Silver Creek—Dunkirk	7.84	7.84	.....	.....	.....	15.68
E	Erie	In city of Buffalo	1.60	.....	.....	.....	.....	1.60
	Long Island:							
Aa	Montauk division	Long Island City—Montauk	115.02	43.99	6.98	4.07	92.27	262.33
Aa	Main line	Long Island City—Greenport	94.44	25.09	13.04	8.92	54.31	195.80
Aa	Atlantic Avenue		.13	.14	.18	.23	9.74	10.42
Ab	Montauk Cut-off	Junction North Shore Branch—Montauk division	1.05	1.03	.....	.....	.74	2.82
Ab	Far Rockaway branch	Valley Stream—New York and Rockaway Beach Junction	7.13	7.13	3.78	.....	5.85	23.89
Ab	Valley Stream branch	Valley Stream—Country Life Press	5.89	.....	.....	.....	.81	6.70
Ab	Long Beach branch	Lynbrook—Long Beach	5.23	1.17	.....	.....	2.96	9.36
Ab	Sag Harbor branch	Bridgehampton—Sag Harbor	4.40	.....	.....	.....	1.49	5.89
Ab	North Shore freight branch	East River—Woodside	2.60	2.60	.....	.....	19.09	24.29
Ab	North Side branch	Winfield—Port Washington	14.07	10.00	.....	.....	5.36	29.43
Ab	Whitestone branch	Whitestone Junction—Whitestone Landing	4.83	.24	.....	.....	2.97	8.04
Ab	Flushing branch	Great Neck Junction—Lawrence street, Flushing	.19	.....	.....	.....	.31	.50
Ab	Glendale Cut-off	Whitepot—Trotting Course Lane	1.67	1.52	.....	.....	.52	3.71
Ab	Springfield branch	Hillside—Springfield Junction	3.37	3.37	.....	.....	9.33	16.07
Ab	Belmont Park branch	Queens—Belmont Park	.91	.88	.....	.....	3.04	4.83
Ab	Central branch	Floral Park—Belmont Junction	19.65	.56	.....	.....	2.41	22.62
Ab	Creedmore branch	Floral Park—Creedmore	2.02	.....	.....	.....	.64	2.66
Ab	Hempstead branch	Mineola—Hempstead	2.41	.....	.....	.....	3.41	5.82
Ab	Oyster Bay branch	Mineola—Oyster Bay	14.58	10.52	.57	.....	6.01	31.68
Ab	Northport branch	Hicksville—Old Northport	15.01	6.02	.....	.....	5.36	26.39
Ab	Bethpage branch	Bethpage Junction—Bethpage	1.52	.....	.....	.....	.84	2.36
Ab	Manor branch	Manorville—Eastport Junction	5.56	.....	.....	.....	.32	5.88
Ab	Bushwick branch	Bushwick Junction—Bushwick	1.80	.....	.....	.....	3.33	5.13
C	Long Island, North Shore branch	Northport Junction—Wading River	30.31	.....	.....	.....	8.97	39.28
C	New York, Brooklyn and Manhattan Beach	Fresh Pond Junction—Bay Ridge	11.93	11.02	.75	.....	17.74	41.44
C	Atlantic avenue	Flatbush avenue—Jamaica	9.39	9.37	1.98	2.19	1.97	24.90
C	Canarsie branch	In city of Brooklyn	1.61	.....	.....	.....	.71	2.32
C	Glendale and East River	South Side crossing—Jefferson street	.37	.....	.....	.....	2.15	2.52
C	New York, Brooklyn and Manhattan Beach	Manhattan Beach Junction—Manhattan Beach	3.73	3.05	.....	.....	4.73	11.51
C	New York and Rockaway Beach	Woodhaven Junction—Ozone Park	.39	.39	.....	.....	.22	1.00

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LOCATION AND LENGTH OF ROAD OPERATED WITHIN THE STATE OF NEW YORK, OPERATING STEAM RAILROAD CORPORATIONS

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Class	Name of corporation and road operated	Termini of portion in New York State	Length of portion in New York State					
			Road or first main track	Second main track	Third main track	Other main tracks	Yard track, sidings, etc.	Total all tracks
			Miles	*Miles*	*Miles*	*Miles*	*Miles*	*Miles*
	Long Island — *Continued:*							
D	New York and Rockaway Beach	Glendale Junction—Rockaway Park	10.31	9.96	3.36	3.19	5.02	31.84
D	New York and Rockaway Beach	Hammel—N. Y. and R. B. Junction	1.67	1.67	1.16	.....	.66	5.16
E	Pennsylvania Tunnel and Terminal	Harold avenue—Pennsylvania Station	3.82	3.82	.....	.....	.....	7.64
	Buffalo, Rochester and Pittsburgh:							
Aa	Buffalo, Rochester and Pittsburgh	Rochester—Ashford	93.70	12.09	.....	.....	66.68	172.47
Aa	Buffalo, Rochester and Pittsburgh	Buffalo Creek—Pennsylvania State line	70.92	25.76	.....	.....	61.49	158.17
Ab	Rochester Belt line	Lincoln Park—Charlotte	8.79	.....	.....	.....	6.84	15.63
Ab	Dock branch	Dock Junction—Genesee Dock	1.51	.....	.....	.....	6.13	7.64
Ab	Silver Lake branch	Silver Lake Junction—Perry	7.60	.....	.....	.....	3.75	11.35
Ab	Salamanca branch	East Salamanca—Salamanca	1.33	.....	.....	.....	3.55	4.88
Ab	Salamanca branch	Buffalo Creek—Buffalo	4.47	4.39	.....	.....	.....	8.86
E	Buffalo Creek	Buffalo Creek—East Buffalo	1.97	1.96	.....	.....	.....	3.93
E	Pennsylvania	Connection with Pfaudler Works, Lincoln Park	.....	.....	.....	.....	.08	.08
E	Pennsylvania	East Buffalo—Buffalo	1.23	1.23	.....	.....	.....	2.46
E	New York Central							
	New York, Ontario and Western:							
Aa	Main line	Cornwall—Oswego	272.22	105.16	.....	.....	174.41	551.79
Ab	Ellenville branch	Summitville—Ellenville	7.37	.....	.....	.....	2.05	9.42
Ab	Delhi branch	Walton—Delhi	16.87	.....	.....	.....	3.74	20.61
Ab	New Berlin branch	New Berlin Junction—New Berlin	22.40	.....	.....	.....	3.20	25.60
B	Pecksport Connecting	Pecksport—Whites Corners	3.70	.....	.....	.....	.65	4.35
C	Wharton Valley	New Berlin—Edmeston	6.85	.....	.....	.....	1.21	8.06

C	Ontario, Carbondale and Scranton	Cadosia—State line	2 92	2 92						6 12
D	Port Jervis, Monticello and Summitville	Port Jervis—Monticello	23 94							27 83
D	Port Jervis, Monticello and Summitville	Summitville—Valley Junction	14 26							15 93
D	Ellenville and Kingston	Ellenville—Kingston	27 81							35 64
D	Utica, Clinton and Binghamton	Randallsville—Utica	31 23							55 80
D	Rome and Clinton	Clinton—Rome	12 70							16 55
E	New York Central	State Line—Cornwall	34 59	34 44						69 03
E	Erie	At Port Jervis	.35							.35
	Central New England:									
Aa	Central New England	Campbell Hall—Boston Corners	66 98	27 73						176 04
Ab	Newburgh, Dutchess and Connecticut branch	State Line—Newburgh, Dutchess and Connecticut Junction	15 27						2 23	17 50
Ab	Newburgh, Dutchess and Connecticut branch	Stissing Junction—Wiccpee Junction	37 82						7 58	45 40
Ab	Hospital branch	P. S. and P. E. connection—Hudson River State Hospital	1 36						1 16	2 52
Ab	New York Central Connection branch	P. S. Hospital branch—New York Central R. R.	1 14						.49	1 63
Ab	Rhinecliff branch	Silvernails—P. and E. Junction	3 38						1 73	5 11
Ab	Danbury branch	Poughkeepsie Junction—Hopewell Junction	11 85	11 85					2 63	26 33
C	Hartford and Connecticut Western	State Line—Boston Corners	6 78						1 39	8 17
C	Hartford and Connecticut Western	Boston Corners—Rhinecliff	35 02						4 12	39 14
D	New York, New Haven and Hartford	Wiccpee Junction—Beacon	1 71	.12					5 65	7 48
D	New York, New Haven and Hartford	Hopewell Junction—Connecticut-State line	28 34	28 34					14 14	70 82
	Rutland:									
A	Rutland	Chatham—Vermont-State line	51 29						5 80	57 09
A	Rutland	Ogdensburg—Vermont-State line	118 80						45 95	164 75
C	Addison R. R. Co	Fort Ticonderoga—Vermont-State line	.82						.35	1 17
	Lehigh and New England:									
D	Campbell Hall Connecting	Liberty Corners—Pine Island Junction	4 11						1 27	5 38
D	Pochuck	Glenwood Junction—Glenwood	2 12						.06	2 18
D	Pochuck	Alba—Empire Quarries	1 00							1 00
E	Erie	Pine Island Junction—Campbell Hall	16 84						.64	17 48
	Pittsburg, Shawmut and Northern (Receiver's operations):									
Aa	Pittsburg, Shawmut and Northern	Wayland Junction—State Line	69 36						20 84	90 20
Aa	Pittsburg, Shawmut and Northern	Prosser—Olean	9 01						1 53	10 54
Ab	Rochester, Hornell and Lackawanna	Moraine—Hornell	10 38						6 32	16 70
E	Delaware, Lackawanna and Western	Wayland—Wayland Junction	1 24							1 24

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LOCATION AND LENGTH OF ROAD OPERATED WITHIN THE STATE OF NEW YORK, OPERATING STEAM RAILROAD CORPORATIONS

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Class	Name of corporation and road operated	Termini of portion in New York State	Length of portion in New York State					
			Road or first main track	Second main track	Third main track	Other main tracks	Yard track, sidings, etc.	Total all tracks
			Miles	*Miles*	*Miles*	*Miles*	*Miles*	*Miles*
	Lehigh and Hudson River:							
Aa	Lehigh and Hudson River	Maybrook—New Jersey-State line	25.20	.....	.....	.....	17.28	42.48
	Buffalo and Susquehanna Railroad Corporation:							
C	Addison and Susquehanna	Addison—Pennsylvania-State line	9.73	.....	.....	.....	2.39	12.12
C	Wellsville, Coudersport and Pine Creek	Wellsville—Pennsylvania-State line	10.11	.....	.....	.....	2.71	12.82
	Ulster and Delaware:							
Aa	Ulster and Delaware	Kingston Point—Oneonta	107.03	.....	.....	.....	30.17	137.20
Ab	Ulster and Delaware	Phoenica—Katerskill	19.19	.....	.....	.....	2.91	22.10
Ab	Ulster and Delaware	Katerskill Junction—Hunter	2.66	.....	.....	.....	.54	3.20
	South Buffalo:							
Aa	South Buffalo	Buffalo—Lackawanna	5.91	.18	.....	.....	7.81	13.90
Ab	South Buffalo	Buffalo—Lackawanna	2.06	.....	.....	.....	.....	2.06
C	Line operated under lease	In Lackawanna Steel Company's Plant yard	25.03	.....	.....	.....	31.87	56.91
	New Jersey and New York:							
Aa	New Jersey and New York	State Line—Stony Point Junction	11.55	.....	.....	.....	4.43	15.98
Ab	New Jersey and New York	Stony Point Junction—Stony Point	1.04	.....	.....	.....	.....	1.04
Ab	New Jersey and New York	Nanuet—New City	4.29	.....	.....	.....	.39	4.68
C	Stony Point branch	Stony Point Junction—Haverstraw	2.37	.....	.....	.....	.79	3.16
D	Garnersville R.R.	Miners Creek—Garnersville Print Works	1.00	.....	.....	.....	.44	1.44
E	Erie	Nanuet—Spring Valley	2.30	.....	.....	.....	.02	2.32

	Buffalo Creek:							
C	Buffalo Creek	In city of Buffalo	5.70	4.87	2.48	.93	18.68	32.66
E	Pennsylvania	In city of Buffalo	.95	.....	.....	.....	.....	.95
	Fonda, Johnstown and Gloversville:							
Aa	Fonda, Johnstown and Gloversville	Fonda—Northville	25.47	.....	.....	.....	8.44	33.91
C	Gloversville and Broadalbin	Broadalbin Junction—Broadalbin	6.15	.....	.....	.....	.69	6.84
	Lake Champlain and Moriah:							
Aa	Lake Champlain and Moriah	Port Henry—Mineville	7.00	.....	.....	.....	18.16	25.16
E	Delaware and Hudson	.....	.....	.....	.....	.....	.14	.14
	Genesee and Wyoming:							
Aa	Genesee and Wyoming	Retsof—Pittsburgh and Lehigh Junction	10.55	.....	.....	.....	2.32	12.87
Aa	Genesee and Wyoming	Retsof—Retsof Junction	1.93	.....	.....	.....	2.55	4.48
Aa	Genesee and Wyoming	Retsof—Greigsville	1.35	.....	.....	.....	.63	1.98
Ab	Genesee and Wyoming	Retsof—Pittsburgh and Lehigh Junction	.45	.....	.....	.....	.....	.45
Ab	Genesee and Wyoming	Retsof—Greigsville	.04	.....	.....	.....	.....	.04
D	Halite and Northern	Halite—Coverdale	3.20	.....	.....	.....	1.05	4.25
	Delaware and Northern:							
Aa	Main line	East Branch—Arkville	37.52	.....	.....	.....	5.00	42.52
Ab	Branch line	Andes Junction—Andes	8.37	.....	.....	.....	.50	8.87
	Greenwich and Johnsonville:							
Aa	Greenwich and Johnsonville	Johnsonville—Schuylerville	21.15	.....	.....	.....	4.35	25.50
	Central New York Southern Railroad Corporation:							
Aa	Central New York Southern R.R. Corp.	Auburn—Renwick Junction	34.62	.....	.....	.....	5.00	39.62
Ab	Central New York Southern R.R. Corp.	Main line, Auburn—Columbia Rope Co.	.41	.....	.....	.....	.46	.87
Ab	Central New York Southern R.R. Corp.	South Lansing—Rogue's Harbor	.49	.....	.....	.....	.....	.49
Ab	Central New York Southern R.R. Corp.	Main line—Power plant	.27	.....	.....	.....	.15	.42
C	Central New York Southern R.R. Corp.	Junction—Auburn station	.15	.....	.....	.....	.....	.15
E	Ithaca Traction Corporation	Renwick Junction—Ithaca	1.73	.....	.....	.....	.....	1.73
	New York and Pennsylvania:							
Aa	New York and Pennsylvania	Canisteo—State line	27.28	.....	.....	.....	5.00	32.28
Aa	New York and Pennsylvania	State Line—Ceres						
	Norwood and St. Lawrence:							
A	Norwood and St. Lawrence	Norwood—Waddington	18.02	.....	.....	.....	1.50	19.52
	Middletown and Unionville:							
A	Middletown and Unionville	Middletown—State line	14.30	.....	.....	.....	3.30	17.60
	Unadilla Valley:							
A	Unadilla Valley	Bridgewater—New Berlin	19.14	.....	.....	.....	1.79	20.93
C	**Skaneateles:**							
A	Skaneateles	Skaneateles Junction—Skaneateles	5.00	.....	.....	.....	1.25	6.25
	Cooperstown and Charlotte Valley:							
	Cooperstown and Susquehanna Valley	Cooperstown—Cooperstown Junction	16.09	.....	.....	.....	2.72	18.81

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LOCATION AND LENGTH OF ROAD OPERATED WITHIN THE STATE OF NEW YORK, OPERATING STEAM RAILROAD CORPORATIONS

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			Miles	*Miles*	*Miles*	*Miles*	*Miles*	*Miles*
	Arcade and Attica:							
A	Buffalo, Attica and Arcade	Attica—Arcade	26.29	.....	.....	.....	1.00	27.29
C	Wellsville & Buffalo R.R.	In Arcade	1.59	.....	.....	.....	.....	1.59
	Marcellus and Otisco Lake:							
A	Marcellus and Otisco Lake	Martisco—Otisco Lake	9.05	.....	.....	.....	2.19	11.24
	Raquette Lake:							
A	Raquette Lake	Carter—Raquette Lake	18.13	.....	.....	.....	3.40	21.53
E	New York Central	Fulton Chain—Carter	6.14	.....	.....	.....	.....	6.14
	Lowville and Beaver River:							
A	Lowville and Beaver River	Lowville—Croghan	10.44	.....	.....	.....	3.19	13.63
	United States and Canada (Grand Trunk):							
A	United States and Canada	International Boundary—Massena Springs	22.18	.....	.....	.....	2.36	24.54
	Bath and Hammondsport:							
A	Bath and Hammondsport	Bath—Hammondsport	9.23	.....	.....	.....	1.06	10.29
	Sterling Mountain:							
A	Sterling Mountain	Sterlington—Lakeville	7.60	.....	.....	.....	1.00	8.60
	Dansville and Mount Morris:							
As	Dansville and Mount Morris	Dansville—Mount Morris	12.25	.....	.....	.....	2.73	14.98
Ab	Sonyea branch	Sonyea—Pennsylvania R.R.	.28	.....	.....	.....	.....	.28
C	Avon, Geneseo and Mount Morris	Mount Morris—Erie station	2.35	.....	.....	.....	.....	2.35
	Owasco River:							
A	Owasco River	In city of Auburn	.37	.....	.....	.....	.50	.87
D	International Harvester Corp	In city of Auburn	1.30	.....	.....	.....	.....	1.30
E	New York Central	In city of Auburn	.44	.....	.....	.....	.....	.44

	Adirondack and St. Lawrence:							
A	Adirondack and St. Lawrence	Hermon—DeKalb Junction	3.61	.....	.....	.....	1.47	5.08
	Schoharie Valley:							
A	Schoharie Valley	Schoharie Junction—Schoharie	4.38	.....	.....	.....	.80	5.18
	Marion:							
As	Marion	Newark Terminal—Marion	8.19	.....	.....	.....	.81	9.00
E	Pennsylvania	Newark station—Newark terminal	1.00	.....	.....	.....	.....	1.00
	Massena Terminal:							
A	Massena Terminal	At Massena	1.98	.....	.....	.....	.09	2.07
	Glenfield and Western:							
A	Glenfield and Western	Glenfield—Monteola	19.45	.....	.....	.....	1.41	20.86
	Grasse River Railroad							
A	Grasse River	Childwold Station—Cranberry Lake	16.00	.....	.....	.....	.98	16.98
	Middleburgh & Schoharie:							
A	Middleburgh & Schoharie	Middleburgh—Schoharie	5.33	.....	.....	.....	1.00	6.33
	Champlain and St. Lawrence (Grand Trunk):							
A	Champlain and St. Lawrence	Rouses Point—International Boundary	1.21	.....	.....	.....	2.83	4.04
	Prattsburgh:							
A	Prattsburgh	Kanona—Prattsburg	11.44	.....	.....	.....	.56	12.00
	Dexter and Northern:							
D	Dexter Sulphite Pulp and Paper Co.	Dexter—Dexter Junction	2.00	.....	.....	.....	.....	2.00
	Troy Union:							
A	Troy Union	In city of Troy	2.03	2.00	.....	.....	1.54	5.57
	Keeseville, Ausable Chasm and Lake Champlain:							
A	Keeseville, Ausable Chasm and Lake Champlain	Keeseville—Port Kent	5.64	.....	.....	.....	.43	6.07
	Fulton Chain:							
A	Fulton Chain	Fulton Chain—Old Forge	2.21	.....	.....	.....	.16	2.37
A	New York Connecting	Woodside—West of Casonova	4.65	4.65	.....	.....	.....	9.30
A	Staten Island	Clifton Junction—Tottenville	12.65	11.83	.....	.....	3.32	27.80
D	Staten Island Transit	Clifton Junction—St. George	1.79	.....	.....	.....	.....	1.79
A	Niagara Junction	Niagara Falls—Suspension Bridge	4.86	.....	.....	.....	.....	4.86
A	Napierville Junction	Rouses Point—International Boundary	1.25	.....	.....	.....	.....	1.25
A	Central Vermont	Rouses Pt.—Vermont-N. Y. State Line	1.00	.....	.....	.....	.....	1.00

Note:— The following railroads have trackage rights only in New York State:—Michigan Central; Pere Marquette; Baltimore & Ohio.
The following railroads shown in I. C. C. list have been abandoned and taken up:— Catskill Mountain; Deer River
The following railroads shown in list above are not included in I. C. C. list:—South Buffalo, Buffalo Creek; Cooperstown and Charlotte Valley; Owasco River; Troy Union; Keeseville, Ausable Chasm and Lake Champlain.

1126

IN THE

DISTRICT COURT OF THE UNITED STATES—

1127 NORTHERN DISTRICT OF NEW YORK.

THE STATE OF NEW YORK and CHARLES D. NEWTON, Personally and as Attorney-General of the State of New York,

Plaintiffs,

1128 *against*

THE UNITED STATES and EDGAR E. CLARK, CHARLES C. McCHORD, BALTHASAR H. MEYER, HENRY C. HALL, WINTHROP M. DANIELS, CLYDE B. ACHESON, ROBERT E. WOLLEY, 1129 JOSEPH B. EASTMAN, HENRY J. FORD and MARK W. POTTER, Constituting The Interstate Commerce Commission,

Defendants.

ORDER TO SHOW CAUSE.

1130 Whereas in the above entitled suit it has been made to appear upon the verified bill of complaint filed herein, a copy of which this day has been produced before the undersigned, Judge of this Court, that on the fact of said bill of complaint, the plaintiffs herein are entitled to an interlocu-

tory injunction restraining the defendants herein 1131
from the commission of the acts complained of and threatened to be committed by the defendants, and that the plaintiffs herein are threatened with irreparable damage and a multiplicity of suits, now on motion of said plaintiffs it is,

Ordered, That the defendants herein, The United States and the Interstate Commerce Com- 1132
mission, appear before the District Court of the United States for the Northern District of New York at the Chambers of the undersigned, the Judge thereof, in the City of Norwich, New York, on the 22d day of January, 1921, at eleven o'clock in the morning of that day, or as soon thereafter as counsel can be heard, and then and there show cause before the undersigned, and Hon. Martin T. 1133
Manton, Circuit Judge and Hon. John R. Hazel, District Judge, convoked as a court by the undersigned in accordance with the statute as made and provided, why the interlocutory injunction prayed for in said bill of complaint should not issue and it is

Further Ordered, That a copy of this order with 1134
the bill of complaint attached thereto be served upon the Attorney General of the United States and upon the Secretary of the Interstate Commerce Commission at least five days before the 22d day of January, 1921, as by the statute made and provided.

GEORGE W. RAY, 1135
United States District Judge.

Dated, Norwich, N. Y., Northern District of New York this ~~2~~ day of January, 1921.

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Filed Jan 6- 1921. 12 M. o'clock M.
C. N. Huggins
Clerk

1136

United States District Court

NORTHERN DISTRICT OF NEW YORK.

THE STATE OF NEW YORK AND CHARLES D. NEWTON, personally and as Attorney-General of the State of New York, *Plaintiffs,*	1137
against	In Equity No. 295.
THE UNITED STATES OF AMERICA AND EDGAR E. CLARK, ET AL., constituting the Interstate Commerce Commission, *Defendants.*	1138

ANSWER OF THE UNITED STATES.

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First Defense.

United States, for the First Defense to the petition filed herein against it, says:

The order of the Interstate Commerce Commission runs against and is directed to certain steam railroad carriers operating within the State of New York and does not run against and is not 1140
directed to the State of New York or the Attorney-General thereof, neither of whom, by reason whereof, has any standing in this court to maintain the petition against the United States to set aside the order and to enjoin the same.

1141 *Answer of the United States.*

Second Defense.

United States, for the Second Defense to the petition filed herein against it, says:

(a) The matters and things alleged in the petition and exhibits attached thereto and sought to be put in issue were all before the Interstate Com-
1142 merce Commission, were fully heard and determined by it, and were within its power and authority to hear and determine under the provisions of the Act to Regulate Commerce and the Transportation Act, 1920. In its reports in writing with respect thereto, made after full hearing
1143 and on due notice to all of the parties, which state its conclusions, together with its decision, order, or requirement in the premises, the matters and things of which complaint is made were fully considered and foreclosed by findings of fact based on substantial evidence adduced on the issues made by the parties.

(b) The petition together with the exhibits at-
1144 tached thereto and made a part thereof is without equity on its face and does not state any cause of action against the United States and the Court may not grant the relief prayed or any part of the same.

Third Defense.

1145 United States, for the Third Defense to the petition filed herein against it, says:

1. On information and belief, it denies the facts alleged in paragraph 1 of the petition, in the manner and form as alleged, with these exceptions: It admits (a) that the State of New York is one of the States of the United States and

Charles D. Newton is Attorney-General thereof; 1146
(b) that the Interstate Commerce Commission is a regulatory body over common carriers engaged in interstate commerce with membership as stated.

2, 3. The facts alleged in paragraphs 2 and 3 are admitted in manner and form as alleged.

4, 5, 6 and 7. It neither admits nor denies the facts alleged in paragraphs 4, 5, 6 and 7, in man- 1147
ner and form as alleged, and insofar as the same become material upon the hearing, it will require strict proof thereof, with this exception: It admits that on or about March 1, 1920, the United States relinquished the possession, control and operation of common carriers by railroad.

8. It has no knowledge of the facts alleged in 1148
paragraph 8, in manner and form as alleged, and insofar as the same become material upon the hearing, it will require strict proof thereof.

9. It admits the facts alleged in paragraph 9, in manner and form as alleged. *Ex Parte* 74 is entitled "IN THE MATTER OF THE APPLI-
CATIONS OF CARRIERS IN OFFICIAL, 1149
SOUTHERN AND WESTERN CLASSIFICATION TERRITORIES FOR AUTHORITY TO INCREASE RATES." For greater certainty with respect thereto, a copy thereof is filed herewith, attached hereto, and made a part hereof, and it is prayed that on the hearing hereof the same may be taken and considered as fully and 1150
completely as if set forth at length herein.

10. It has no knowledge of the facts alleged in paragraph 10, and insofar as the same become material upon the hearing, it will require strict proof thereof.

1151 *Answer of the United States.*

11. It has no knowledge of the facts alleged in paragraph 11, and insofar as the same become material upon the hearing, it will require strict proof thereof.

12. It denies the facts alleged in paragraph 12 of the petition, in manner and form as alleged,
1152 with this exception: It admits that the companies named filed with the Interstate Commerce Commission the second amended and supplemental petition, and that, subject to verification, the copy attached to the petition marked "Paper 3" is correct.

13. It denies the facts alleged in paragraph 13,
1153 in manner and form as alleged. It admits that a hearing was held, pursuant to order and notice, before Wilbur La Roe, Jr., Esq., Chief Examiner of the Interstate Commerce Commission, in the City of New York, on September 13, 1920. It has no knowledge that the paper attached to the petition marked "Paper 4" is "a true and complete
1154 copy of the stenographic minutes of said hearing," and if the same becomes material upon the hearing, it will require strict proof thereof. It alleges that even if "Paper 4" is "a true and complete copy of the stenographic minutes of said hearing," it and the exhibits therein offered and the orders and reports of the Commission therein and herein referred to constitute sufficient evi-
1155 dence upon which to rest the report of the Commission in pursuance of which it entered its final order.

14, 15. It has no knowledge of the facts alleged in paragraphs 14 and 15, in manner and form as alleged, and insofar as the same become material upon the hearing, it will require strict proof

thereof, with this exception: It admits that petitioner, Charles D. Newton, entered his appearance before the Interstate Commerce Commission, as shown by its report, for the State of New York and that both the State of New York and Charles D. Newton were represented at the proceedings. 1156

16. It denies the facts alleged in paragraph 16, in manner and form as alleged, with this exception: It admits the Commission, on November 13, 1920, made and entered its report, findings and order, and, subject to verification, that "Paper 5" is a correct copy thereof. 1157

17, 18. It denies the facts alleged in paragraphs 17 and 18, in manner and form as alleged, and insofar as the same become material upon the hearing, it will require strict proof thereof, with this exception: It admits that the carriers operating within the State of New York, or certain of them, filed with the Commission their tariffs and schedules in compliance with, or attempted compliance with, the report and order of the Commission and that they have been and are endeavoring to charge, collect and receive rates, fares and charges in pursuance of such tariffs. 1158 1159

19. It has no knowledge of the matters and things alleged in paragraph 19, in manner and form as alleged, and insofar as the same become material upon the hearing, it will require strict proof thereof. 1160

20. Except as shown by the reports of the Commission, it has no knowledge of the matters alleged in paragraph 20, in manner and form as alleged, and insofar as the same become material upon the hearing, it will require strict proof thereof.

1161 21. Except as appears otherwise from the reports and order of the Commission, it denies the facts alleged in paragraph 21 and each and all of the same, in manner and form as alleged, and if the same become material upon the hearing, it will require strict proof thereof, with these exceptions: It admits (a) that the State of New
1162 York is one of the States of the United States; (b) that the carriers, or many of them, joined in the order of the Interstate Commerce Commission operate within the boundaries of the State of New York in intrastate commerce and that many of them are corporations chartered under
1163 its laws.

22. It has no knowledge of the facts alleged in paragraph 22, in manner and form as alleged, and insofar as the same become material upon the hearing, it will require strict proof thereof.

23. It has no knowledge of the facts alleged in paragraph 23, and insofar as the same become
1164 material upon the hearing, it will require strict proof thereof, with this exception: It admits that Charles D. Newton is Attorney General of the State of New York.

24. It denies the facts and conclusions alleged in paragraph 24 and each and all of the same.

25. It has no knowledge of the facts alleged in paragraph 25, in manner and form as alleged, and
1165 insofar as the same become material upon the hearing, it will require strict proof thereof.

Further answering the said petition, and each and every part of the same, insofar as it has not heretofore been admitted, denied, or otherwise traversed, defendant denies —

(a) Any fact or facts alleged in said petition, 1166
or any part of the same, which deny, or which seek to deny, any fact or facts found by the Interstate Commerce Commission in its reports and order.

(b) Any fact or facts alleged in said petition, or any part of the same, which are inconsistent with any fact or facts found by the Interstate 1167
Commerce Commission in its reports and order.

(c) Any and all inferences of fact from any particular fact or facts alleged in the said petition, or any part of the same, which seek to deny, or which are inconsistent with any fact or facts found by the Interstate Commerce Commission 1168
in its report and order.

(d) Any fact or facts alleged in said petition, or any part of the same, which set up, or which seek to set up, matters and things which were not before the Interstate Commerce Commission.

(e) Any fact or facts alleged in said petition, or any part of the same, which attack or which 1169
seek to attack the reports and order of the Interstate Commerce Commission, and to show facts other than what the said reports and order show on the face thereof.

(f) Any allegations in said petition, or any part of the same, which allege that facts were found by the Interstate Commerce Commission in its said reports and order which, as shown on the face 1170
thereof, in fact were not so found.

(g) Any conclusions of law alleged and insisted upon in the said petition, or any part of the same, which are inconsistent with any conclusions of

1171 *Answer of the United States.*

law held by the Interstate Commerce Commission in its said reports and order.

(h) Each and every allegation in the said petition contained not herein specifically admitted or denied.

Wherefore, having fully answered, defendant
1172 prays that the petition be dismissed at the cost of the petitioners, and for such other and further order as may be appropriate.

BLACKBURN ESTERLINE,
Special Assistant to the
Attorney-General.

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DENNIS B. LUCEY,
United States Attorney.

Filed Jan 20- 1921.
C. W. Huggins
Clerk

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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK.

THE STATE OF NEW YORK AND CHARLES D. NEWTON, personally and as Attorney-General of the State of New York, *Plaintiffs,* *v.* THE UNITED STATES AND EDGAR E. CLARK, CHARLES C. McCHORD, BALTHASAR H. MEYER, HENRY C. HALL, WINTHROP M. DANIELS, CLYDE B. AITCHISON, ROBERT W. WOOLLEY, JOSEPH B. EASTMAN, HENRY J. FORD AND MARK W. POTTER, constituting the Interstate Commerce Commission, *Defendants.*	No. 295. In Equity.

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ANSWER OF THE INTERSTATE COMMERCE COMMISSION.

The Interstate Commerce Commission, one of the defendants in the above-entitled suit, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the plaintiffs' bill of complaint contained, for answer thereunto or unto so much or such parts thereof as this defendant is advised is material for it to make answer unto, answers and says:

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1181 *Answer of the Interstate Commerce Commission.*

I.

Answering paragraphs 1 to 14 inclusive of the bill of complaint, this defendant, which for convenience will be referred to hereinafter as the Commission, admits that the allegations of fact contained in said paragraphs are true, but the
1182 Commission neither admits nor denies that the conclusions of law contained in said paragraphs are, or that any of said conclusions is, correct.

II.

Answering paragraph 15 of the bill of complaint, the Commission admits that it set for
1183 hearing of argument on October 11, 1920, the proceeding relating to matters covered by the report, findings and order referred to in paragraph 16 of the bill of complaint, and that at said hearing the State of New York was represented by its attorney general, who objected to the juris-
1184 diction of the Commission, but the Commission denies that said hearing was either set or held upon the record made before the Mr. LaRoe mentioned in said paragraph 15. In this connection, the Commission alleges that said hearing was held instead upon said record, and upon the record made in a proceeding known as Ex parte 74, mentioned in paragraph 9 of the bill
1185 of complaint.

III.

Answering paragraph 16 of the bill of complaint, the Commission admits that it made the report, findings and order mentioned in said paragraph, but denies that the action taken by the

1186 Commission in doing so is correctly described in said paragraph. In this connection the Commission respectfully refers the court to said report, findings and order, which are attached to and made a part of the bill of complaint.

IV.

1187 Answering paragraph 17 of the bill of complaint, the Commission admits that, effective on November 29, 1920, the railroads operating within the State of New York in intrastate commerce and named in said order filed in the Commission's office certain tariffs and schedules increasing the rates, fares and charges for the intrastate car- 1188 riage covered by said order, and that said tariffs and schedules were received by the Commission.

V.

Answering paragraph 18 of the bill of complaint, the Commission disclaims information sufficient to form a belief as to whether the railroads 1189 named in said order are now demanding and collecting, or threatening to demand and collect, the increased rates, fares and charges covered by said order, but, for the purposes of this suit, the Commission admits that said railroads are so demanding and collecting.

VI. 1190

Answering paragraph 19 of the bill of complaint, the Commission admits that the New York Central Railroad Company is a corporation organized and consolidated and doing business under the laws of the State of New York, but

1191 disclaims information sufficient to form a belief as to whether chapter 76 of the Statute Laws of 1853 of the State of New York is correctly set forth in said paragraph, or as to whether said railroad accepted the conditions and provisions of said statute, or as to whether said chapter 76
1192 remains unrepealed by the Legislature of the State of New York or unaffected by any authority, judicial or executive, of the State of New York, or as to whether the two-cent fare provided for in said chapter was, by authorities of said State, declared again effective on September 1, 1920. The Commission denies that said two-cent fare
1193 for way passengers on the line between Albany and Buffalo is now the only legal and constitutional fare in said State for intrastate traffic over said line in the State of New York.

VII.

Answering paragraph 20 of the bill of com-
1194 plaint, the Commission, for the purposes of this suit, admits that each of the allegations contained in said paragraph is true.

VIII.

Answering paragraphs 21 to 25 inclusive of the bill of complaint, the Commission alleges that the
1195 report, findings and order to which said paragraphs relate were made by it in a proceeding of investigation instituted by the Commission upon petition filed under section 13 of the interstate commerce act, for the purpose of determining whether the rates, fares and charges covered by said report, findings and order were, or

1196 whether any of them was, unduly or unreasonably advantageous, preferential or prejudicial as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or unduly, unreasonably, or unjustly discriminatory against interstate commerce or foreign commerce, within the meaning 1197 of, and in violation of, the interstate commerce act; that in connection with said questions the full hearing provided for in section 13 of said act was accorded to each of the plaintiffs and to all other interested parties; that at said hearing a large volume of testimony and other evidence, bearing upon said questions, was submitted to the 1198 Commission for consideration; that at said hearing and subsequently, both orally and in briefs filed in said proceeding, said questions were fully argued and the matters involved in said proceeding were submitted to the Commission for determination, whereupon the Commission determined said questions and made a report, stating the 1199 Commission's decision, conclusion, and requirements in the premises, and also made, based thereon, the order involved in this suit; and that in and by said report the Commission said:

> The record shows that the refusal of the State of New York to permit the carriers to increase the rates and fares here in controversy to the extent approved by us is 1200 costing the railroads between $11,000,000 and $12,000,000 annually. In other words, the annual earnings of the interstate carriers operating in New York are now between $11,000,000 and $12,000,000 less than they would be if the general level of rates and fares approved by us had become effective

1201 on intrastate traffic; and to that extent the declared purpose of Congress is defeated by a preferential basis of rates and fares maintained by authority of the State of New York.

This proceeding presents a practical question which we have endeavored to deal with in a practical way. The needs of these interstate carriers for revenue to enable them to 1202 provide adequate transportation service and facilities are immediate and in the interest of the public can not be permitted to await the consideration in detail of individual fares, charges, and rates. The record shows that the respondent carriers perform the services here in question under substantially similar circumstances and conditions, 1203 whether in respect of interstate or intrastate transportation; and that the lower basis of intrastate fares, charges, and rates results in undue prejudice against interstate passengers and shippers and unjust discrimination against interstate commerce. The present record warrants the findings hereinafter made. Those findings are without prejudice to the right of the authorities of the 1204 State of New York, or of any other interested party, to apply in the proper manner for a modification of our findings and order as to any fares, charges, or rates on the ground that the latter are not related to the interstate fares, charges, or rates in such a way as to contravene the provisions of the interstate commerce act.

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Passenger Fares.

The record leaves no doubt as to the unduly preferential character of the intrastate fares and charges now in effect in the State of New York. Interstate passenger fares are in general on a basis of 3.6 cents

per mile as maximum. Passengers traveling between points in the State of New York and points in other States may be required to pay 3.6 cents per mile, whereas passengers traveling within the State of New York pay only 3 cents per mile. The basis of 3.6 cents applies on intrastate traffic in every State bordering on the State of New York. In other words, intrastate passengers in New York enjoy a basis of fares distinctly lower than those exacted of interstate travelers in the same territory, often riding in the same trains, and also lower than the fares paid by intrastate passengers in neighboring States. The record shows beyond question that there are no transportation conditions in the State of New York that justify lower rates or fares, on the whole, than those applicable in neighboring States, or lower than the interstate rates and fares between points in New York and points in other States.

The situation is well illustrated by the fares between New York City and Buffalo. Of the several available routes connecting these points that over the New York Central is intrastate while the others are interstate. Exclusive of war taxes it appears that since August 26, 1920, the fare has been $14.27 over the interstate routes and $13.16 over the New York Central, a difference of $1.11 in favor of the passenger using the latter route. In the case of a passenger occupying a lower Pullman berth the difference is increased to $2.36. Moreover, a passenger traveling fro m New York City to a point west of Buffalo can, by buying a ticket to Buffalo over the New York Central and buying another ticket at Buffalo to his destination, defeat the through interstate fare. Representatives of the carriers stated that

1211 the inevitable result of this situation would be the reduction of the interstate fare from New York to Buffalo to the level of the intrastate fare, and that this would tend to disrupt the entire fabric of the interstate passenger fares in the territory involved.

Inasmuch as the excess-baggage charges
1212 are arranged upon a scale bearing a fixed relationship to passenger fares and correspondingly graded in amount, such charges are governed by the passenger fares, and any discrimination in passenger fares would necessarily involve a discrimination in excess-baggage charges. This statement concerning the manner in which the baggage charges are determined is based upon the
1213 schedule of rates and charges of the carriers now on file in the Commission's office.

Rates on Milk and Cream.

The expression "milk and cream" as used herein includes milk, cream, skim milk, buttermilk, condensed milk, evaporated milk, and pot cheese, and for the purpose of indi-
1214 cating the effect upon interstate commerce and upon the revenues of carriers, of the discrimination under consideration, we give illustrations as follows:

The New York Central Railroad Company operates nine milk trains daily into the New York City district, carrying 1,300,000 quarts of milk and cream, of which approximately
1215 75 per cent is shipped over intrastate routes and approximately 25 per cent over interstate routes.

Nine or ten carloads of milk and cream per day originate on the Ulster & Delaware Railroad, which extends from Kingston, N. Y., northwesterly to Oneonta, 107 miles. The cars are delivered to the New York Cen-

1216 tral at Kingston and, together with six or seven cars originating on a branch of the latter carrier extending southwesterly from Kingston, are there formed into a milk train which moves to New York over the tracks of the West Shore line. This route runs through a part of the State of New Jersey, the West Shore terminals being at Wee- 1217 hawken, N. J., and is therefore an interstate route. Shipments of milk and cream also originate at points along the east side of the Hudson in territory not far distant from that served by the Ulster & Delaware and move to New York over the intrastate route of the New York Central along the east bank of the Hudson River. On shipments using the interstate route the rates charged are 20 per 1218 cent higher than those over the intrastate route, although there is no justification from a transportation viewpoint for a difference in the rates.

Again, a milk train is operated by the Delaware & Hudson Railroad from Eagle Bridge, N. Y., which is northeast of Troy, in a northerly direction, a distance of 52 1219 miles, to Castleton, Vt., thence southwesterly to Troy, N. Y., where it is delivered to the New York Central. Between Eagle Bridge and Castleton this train crosses the State line three times and again shortly after leaving Castleton for Troy. All shipments received before the last crossing of the State line are interstate shipments, the 1220 others intrastate shipments. On milk and cream in this train which happens to cross a State line charges must be paid substantially in excess of those applying on intrastate shipments moving in the same train. There is no doubt that shipments of milk and cream originating in western Vermont

1221 and shipped to the New York City district over interstate routes are in direct competion with shipments of the same commodities originating in the eastern part of the State of New York and moving to the New York City district over intrastate routes.

1222 Furthermore, there is a substantial portion of the State of New York, which embraces, generally speaking, the central portion of the State, from which milk and cream may move to the New York City district over either interstate routes or intrastate routes. For the purpose of illustration we may refer to the line of the New York Central extending from Albany to Syracuse with a branch line ex-
1223 tending from Syracuse southeasterly to Earlville, and to the line of the Delaware & Hudson from Binghamton to Albany. From this whole territory shipments of milk and cream may move to the New York City district over intrastate routes. From the same general territory, however, shipments may move over the interstate routes of the New York, Ontario & Western, the Delaware,
1224 Lackawanna & Western, and the Lehigh Valley Railroads. Each of these roads has one or more points of contact with the New York Central's main line between Utica and Syracuse and with its branches in that territory. Shipments moving over the interstate routes now pay charges 20 per cent higher than those charged for shipments from substan-
1225 tially the same territory moving over intrastate routes.

The rates on milk and cream to the New York City district have been considered by us at various times. In *Milk and Cream Rates to New York City,* 45 I. C. C. 412, we found that the interstate rates on this traffic were unreasonable and unduly prejudicial to shippers from near-by points and unduly

preferential of shippers from distant points; and we prescribed a scale of mileage rates, in blocks of 10 miles each, for distances up to 630 miles. The prescribed basis was also adopted by the New York Central on intrastate traffic, resulting in a uniform scale of rates over interstate and intrastate routes. By the application of the 20 per cent increase 1227
to interstate rates without a corresponding increase in intrastate rates, this uniformity has been destroyed.

Commutation Fares.

The record contains comparatively little evidence on the subject of commutation fares, but so far as it goes it discloses facts in the presence of which we can not presume that 1228
the existing rate structure is just and reasonable in its established relationships and that it should be adopted as the basis upon which a general advance should be authorized, as in the foregoing particulars. We shall therefore reserve for future consideration this branch of the case, and as to it we do not now make any finding or enter any order, but we 1229
shall keep the case open for further investigation, limited to the subject of commutation fares and commutation baggage charges in the State of New York as to the question whether they cause any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand, and interstate or foreign commerce on the other hand, or any 1230
undue, unreasonable, or unjust discrimination against interstate or foreign commerce.

Findings.

Subject to the above reservation in the matter of commutation fares and commuta-

1231 *Answer of the Interstate Commerce Commission.*

tion baggage charges, we are of the opinion and find that the increases made by the carriers under Ex parte 74, relating to passenger fares and baggage charges, and now in effect, result in reasonable passenger fares and baggage charges for interstate transportation within the territory involved in this proceeding, and that the failure of the carriers within the State of New York to increase the standard intrastate fares and charges correspondingly has resulted in the past and will result in the future: In intrastate fares and charges lower than the corresponding interstate fares and charges; in undue prejudice to persons traveling in interstate commerce within the State of New York and between points in the State of New York and points in other States; in undue preference and advantage to persons traveling intrastate in New York, and in unjust discrimination against interstate commerce.

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We further find that said undue prejudice and unjust discrimination should be removed by making increases in said intrastate passenger fares and baggage charges which shall correspond with the increases heretofore made as aforesaid in interstate passenger fares and baggage charges.

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We further find that the increases made by the carriers under Ex parte 74, relating to space occupied by passengers in sleeping and parlor cars, result in reasonable charges for the occupancy of such space by passengers traveling in interstate commerce in the territory involved in this proceeding, and that the failure of the carriers within the State of New York to increase correspondingly the charges for like space for passengers traveling in intrastate commerce has resulted in the past and will result in the future: In intrastate charges lower than the cor-

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1236 responding interstate charges; in undue prejudice to persons traveling in interstate commerce within the State of New York and between points in the State of New York and points in other States; in undue preference and advantage to persons traveling intrastate in New York, and in unjust discrimination against interstate commerce.

1237 We further find that said undue prejudice and unjust discrimination should be removed by making increases in said intrastate charges which shall correspond with the increases heretofore made as aforesaid in interstate charges.

1238 We further find that the increases made by the carriers under Ex parte 74, relating to rates on milk and cream, and now in effect, result in reasonable rates on milk and cream for interstate transportation within the territory involved in this proceeding, and that the failure of the carriers within the State of New York to increase the intrastate rates on milk and cream correspondingly has resulted in the past and will result in the future: In intrastate rates lower than the

1239 corresponding interstate rates; in undue prejudice to shippers of milk and cream in interstate commerce within the State of New York and between points in the State of New York and points in other States; in undue preference and advantage to shippers of milk and cream in intrastate commerce in New York and in unjust discrimination against interstate commerce.

1240 We further find that said undue prejudice and unjust discrimination should be removed by making increases in said intrastate rates on milk and cream which shall correspond with the increases heretofore made as aforesaid in the rates on milk and cream shipped in interstate commerce.

1241 *Answer of the Interstate Commerce Commission.*

We further find that, whether the aforesaid passenger fares, baggage charges, surcharges, or rates on milk and cream pertain to transportation in interstate commerce or to transportation in intrastate commerce, the transportation services, in each instance, are performed by the carriers under substantially similar circumstances and conditions.

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The Commission further alleges that said findings were, and are, and that each of them was, and is, fully supported and justified by the record before the Commission in said proceeding.

The Commission further alleges that in making said report, findings and order it considered and

1243 weighed carefully in the light of its own knowledge and experience every fact, circumstance, and condition called to its attention on behalf of the parties to said proceeding, including matters covered by allegations in the bill of complaint in this suit.

The Commission further alleges that said re-

1244 port, findings and order were not made by it either arbitrarily or unjustly, or contrary to the relevant evidence, or without evidence to support them; that in making them it did not exceed the authority which had been duly conferred upon it, or exercise that authority in an unreasonable manner; and the Commission denies each of, and

1245 all, the allegations to the contrary contained in said bill of complaint.

For the purposes of this suit, the Commission admits that the allegations of fact contained in paragraph 22 of the bill of complaint are true, except that it denies that the parties mentioned in said paragraph or in paragraph 21 are, or that

Answer of the Interstate Commerce Commission.

any of them is, now suffering either irreparable damage, or any damage, on account of said order. 1246

For the purposes of this suit, the Commission admits that, as stated in paragraph 23 of the bill of complaint, the plaintiff, Charles D. Newton, is attorney-general of the State of New York and has his office at Albany in that State, but the Commission disclaims information sufficient to form a belief concerning the duties imposed by law upon said Newton as such attorney-general, or concerning the penalties to which he may be subjected if he fails to perform the duties, or any of the duties, so imposed. 1247

Except as herein expressly admitted, the Commission denies the truth of each of, and all, the allegations contained in the bill of complaint herein, in so far as they conflict either with the allegations in this answer, or with either the statements or conclusions of fact included in the Commission's said report, findings and order, which are hereby referred to and made a part hereof. 1248

All of which matters and things the Commission is ready to aver, maintain, and prove, as this honorable court shall direct, and thereby prays that said bill of complaint be dismissed. 1249

INTERSTATE COMMERCE COMMISSION,

By P. J. FARRELL,

Chief Counsel. 1250

CITY OF WASHINGTON,

District of Columbia, ss.:

Henry C. Hall, being duly sworn, deposes and says that he is a member of the Interstate Com-

merce Commission, the above-named defendant, and makes this affidavit on behalf of said Commission; that he has read the foregoing answer and knows the contents thereof, and that the same is true.

HENRY C. HALL.

Subscribed and sworn to before the undersigned, a notary public within and for the District of Columbia, this 19th day of January, 1921.

[SEAL] ALFRED HOLMEAD,
Notary Public.

My com. mission expires July 10-1924

Filed Jan 20-1921.
C. M. Hoggson
Clerk

At a Term of the District Court for the Northern District of New York, held at Norwich, N. Y., on the 19th day of February, 1921.

Present:

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Hon. MARTIN T. MANTON,
Circuit Judge.

Hon. GEORGE W. RAY,
Hon. JOHN R. HAZEL,
District Judges.

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THE STATE OF NEW YORK and CHARLES D. NEWTON, Personally and as Attorney-General of the State of New York,
Plaintiffs,
against
THE UNITED STATES and others, Constituting the INTERSTATE COMMERCE COMMISSION,
Defendants.

Equity No. 298.

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On reading and filing the petition of Schoharie Valley Railway Co., verified on the eighteenth day of February, 1921, praying for leave to intervene as a party defendant in the above entitled suit, now pending before this Court, and good cause appearing, it is 1260

On motion of William D. Waldron, Solicitor for said petitioner,

1261 *Petition for Leave to Intervene.*

ORDERED that petitioner have leave to appear and intervene as a party defendant in the above entitled suit and to defend the same and be represented therein by counsel.

Dated, Norwich, N. Y., Northern District of New York, on this 19th day of February, 1921,
1262 at 11.30 o'clock A. M.

MARTIN T. MANTON,
Circuit Judge.

GEO. W. RAY,
JOHN R. HAZEL,
District Judges.

1263

U. S. DISTRICT COURT — NORTHERN DISTRICT OF NEW YORK.

THE STATE OF NEW YORK and 1264 CHARLES D. NEWTON, Personally and as Attorney-General of the State of New York, *Plaintiffs,* *against* THE UNITED STATES and others, Constituting the INTERSTATE 1265 COMMERCE COMMISSION, *Defendants.*	Equity No. 295

Your petitioner Schoharie Valley Railway Company respectfully shows unto your honors.

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I

That it is a corporation organized and existing under the laws of the State of New York and that it is a railroad corporation engaged in interstate and intrastate commerce and subject to the Interstate Commerce Act.

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II

That this suit is brought to restrain the enforcement, operation and execution of, and to set aside in whole, the report, findings and order of the Interstate Commerce Commission in a proceeding had before said Commission entitled " In the Matter of the Rates, Fares and Charges of the New York Central Railroad Company and other Railroad Companies in the State of New York," known as I. C. C. Docket No. 11623, in which proceeding your petitioner was a party in interest, and in and by which order said Commission authorized and directed your petitioner, among others, to cease and desist from practising the undue prejudice, undue preference and advantage, and unjust discrimination found in the Commission's report therein to exist, and to put in force and maintain the increased passenger, baggage and milk and cream rates and the surcharge on parlor and sleeping car space intrastate in the State of New York, complained of in the Bill of Complaint filed in this cause.

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III

Your petitioner has a substantial interest in the subject matter of this suit by reason of the fact

1271 *Petition for Leave to Intervene.*

that if the enforcement, operation and execution of said report, findings and order are restrained and the same are set aside, your petitioner will lose and be deprived of large sums of money, amounting to many thousands of dollars annually, which it now is entitled to and receives from said

1272 increased rates, fares and charges.

Your petitioner therefore prays that it be granted leave to appear as a party defendant in the above entitled suit and be represented therein by counsel, in accordance with the provisions of the statute in such case made and provided.

February 18, 1921.

1273 SCHOHARIE VALLEY RAILWAY CO.,

By WILLIAM D. WALDRON,
Its Solicitor.

. . . . . .
Solicitor for Petitioner.

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. . . . . .

THE UNITED STATES OF AMERICA,
STATE OF NEW YORK,
COUNTY OF NEW YORK. } *ss.:*

1275 R. C. Kann, being duly sworn, on oath says, that he is Assistant Secretary of the above-named petitioner; that he has read the foregoing petition subscribed by him on behalf of said petitioner and knows the contents thereof, and that the same is true of his own knowledge, except as to the

matters therein stated to be alleged on information and belief, and as to these matters he believes it to be true.

R. C. KANN.

Subscribed and sworn to before me
this 18th day of February, 1921.

CELIA SACHS,
Notary Public, New York County.
New York Register No. 2133.

My commission expires March 30, 1922.

(Seal)

1281 *Petition for Leave to Intervene.*

At a Term of the District Court for the Northern District of New York, held at Norwich, N. Y., on the 19th day of February, 1921.

Present:

1282 Hon. MARTIN T. MANTON,
Circuit Judge.

Hon. GEORGE W. RAY,
Hon. JOHN R. HAZEL,
District Judges.

1283 THE STATE OF NEW YORK and CHARLES D. NEWTON, Personally and as Attorney-General of the State of New York,
Plaintiffs,

against

1284 THE UNITED STATES and others, Constituting the INTERSTATE COMMERCE COMMISSION,
Defendants.

} Equity No. 298.

On reading and filing the petition of Greenwich
1285 & Johnsonville Ry. Co., verified on the eighteenth day of February, 1921, praying for leave to intervene as a party defendant in the above entitled suit, now pending before this Court, and good cause appearing, it is

On motion of William D. Waldron, Solicitor for said petitioner,

Petition for Leave to Intervene. 1286

ORDERED that petitioner have leave to appear and intervene as a party defendant in the above entitled suit and to defend the same and be represented therein by counsel.

Dated, Norwich, N. Y., Northern District of New York, on this 19th day of February, 1921, at 11:30 o'clock A. M. 1287

MARTIN T. MANTON,
Circuit Judge.

GEO. W. RAY,
JOHN R. HAZEL,
District Judges.

1288

U. S. DISTRICT COURT — NORTHERN DISTRICT OF NEW YORK.

THE STATE OF NEW YORK and CHARLES D. NEWTON, Personally and as Attorney-General of the State of New York, 1289
Plaintiffs,

against

THE UNITED STATES and others, Constituting the INTERSTATE COMMERCE COMMISSION, 1290
Defendants.

Equity No. 295

Your petitioner Greenwich & Johnsonville Railway Company respectfully shows unto your honors

1291 *Petition for Leave to Intervene.*

I

That it is a corporation organized and existing under the laws of the State of New York and that it is a railroad corporation engaged in interstate and intrastate commerce and subject to the Inter-
1292 state Commerce Act.

II

That this suit is brought to restrain the enforcement, operation and execution of, and to set aside in whole, the report, findings and order of the Interstate Commerce Commission in a proceeding had before said Commission entitled
1293 "In the Matter of the Rates, Fares and Charges of the New York Central Railroad Company and other Railroad Companies in the State of New York," known as I. C. C. Docket No. 11623, in which proceeding your petitioner was a party in interest, and in and by which order said Commission authorized and directed your petitioner,
1294 among others, to cease and desist from practising the undue prejudice, undue preference and advantage, and unjust discrimination found in the Commission's report therein to exist, and to put in force and maintain the increased passenger, baggage and milk and cream rates and the surcharge on parlor and sleeping car space intra-
1295 state in the State of New York, complained of in the Bill of Complaint filed in this cause.

III

Your petitioner has a substantial interest in the subject matter of this suit by reason of the fact that if the enforcement, operation and execu-

tion of said report, findings and order are restrained and the same are set aside, your petitioner will lose and be deprived of large sums of money, amounting to many thousands of dollars annually, which it now is entitled to and receives from said increased rates, fares and charges.

Your petitioner therefore prays that it be granted leave to appear as a party defendant in the above entitled suit and be represented therein by counsel, in accordance with the provisions of the statute in such case made and provided.

February 18, 1921.

GREENWICH & JOHNSONVILLE RY. CO.

By WILLIAM D. WALDRON,

Its Solicitor.

.....

Solicitor for Petitioner.

.....Walter G. Hopper

.....Of Counsel

THE UNITED STATES OF AMERICA,
STATE OF NEW YORK,
COUNTY OF NEW YORK. } *ss.:*

W. H. Davies, being duly sworn, on oath says that he is Treasurer of the above-named petitioner; that he has read the foregoing petition subscribed by him on behalf of said petitioner and knows the contents thereof, and that the same is true of his own knowledge, except as to the

1301 *Petition for Leave to Intervene.*

matters therein stated to be alleged on information and belief, and as to these matters he believes it to be true.

W. H. DAVIES.

Subscribed and sworn to before me
1302 this 18th day of February, 1921.

CELIA SACHS,
Notary Public, New York County.
New York Register No. 2133.
My commission expires March 30, 1922.

(Seal)

1303

Filed Feb-19-1921.
C. W. Higginson
Clerk

1304

1305

Petition for Leave to Intervene.

At a Term of the District Court for the Northern District of New York, held at Norwich, N. Y., on the 19th day of February, 1921.

Present:

Hon. MARTIN T. MANTON,
Circuit Judge.

Hon. GEORGE W. RAY,
Hon. JOHN R. HAZEL,
District Judges.

THE STATE OF NEW YORK and CHARLES D. NEWTON, Personally and as Attorney-General of the State of New York,

Plaintiffs,
against

THE UNITED STATES and others, Constituting the INTERSTATE COMMERCE COMMISSION,
Defendants.

Equity No. 298.

On reading and filing the petition of The Delaware and Hudson Company, verified on the eighteenth day of February, 1921, praying for leave to intervene as a party defendant in the above entitled suit, now pending before this Court, and good cause appearing, it is

On motion of William D. Waldron, Solicitor for said petitioner,

1311 *Petition for Leave to Intervene.*

ORDERED that petitioner have leave to appear and intervene as a party defendant in the above entitled suit and to defend the same and be represented therein by counsel.

Dated, Norwich, N. Y., Northern District of New York, on this 19th day of February, 1921, at
1312 11.30 o'clock A. M.

MARTIN T. MANTON,
Circuit Judge.

GEO. W. RAY,
JOHN R. HAZEL,
District Judges.

1313

U. S. DISTRICT COURT — NORTHERN DISTRICT OF NEW YORK.

THE STATE OF NEW YORK and CHARLES D. NEWTON, Personally and as Attorney-General of the
1314 State of New York, *Plaintiffs,* *against* THE UNITED STATES and others, Constituting the INTERSTATE COMMERCE COMMISSION,
1315 *Defendants.*	Equity No. 295.

Your petitioner The Delaware and Hudson Company, respectfully shows unto your honors

 1316

I

That it is a corporation organized and existing under the laws of the State of New York and that it is a railroad corporation engaged in interstate and intrastate commerce and subject to the Interstate Commerce Act.

1317

II

That this suit is brought to restrain the enforcement, operation and execution of, and to set aside in whole, the report, findings and order of the Interstate Commerce Commission in a proceeding had before said Commission entitled "In the Matter of the Rates, Fares and Charges of the 1318
New York Central Railroad Company and other Railroad Companies in the State of New York," known as I. C. C. Docket No. 11623, in which proceeding your petitioner was a party in interest, and in and by which order said Commission authorized and directed your petitioner, among others, to cease and desist from practising the 1319
undue prejudice, undue preference and advantage, and unjust discrimination found in the Commission's report therein to exist, and to put in force and maintain the increased passenger, baggage and milk and cream rates and the surcharge on parlor and sleeping car space intrastate in the State of New York, complained of in the Bill of 1320
Complaint filed in this cause.

III

Your petitioner has a substantial interest in the subject matter of this suit by reason of the fact

1321 *Petition for Leave to Intervene.*

that if the enforcement, operation and execution of said report, findings and order are restrained and the same are set aside, your petitioner will lose and be deprived of large sums of money, amounting to many thousands of dollars annually, which it now is entitled to and receives from said
1322 increased rates, fares and charges.

Your petitioner therefore prays that it be granted leave to appear as a party defendant in the above entitled suit and be represented therein by counsel, in accordance with the provisions of the statute in such case made and provided.

1323 February 18, 1921.

THE DELAWARE AND HUDSON CO.,
By WILLIAM D. WALDRON,
Its Solicitor.

.....

Solicitor for Petitioner

1324 ...Walter C. Noyes
.....J. Council

THE UNITED STATES OF AMERICA,
STATE OF NEW YORK,
COUNTY OF NEW YORK. } *ss.:*

1325 W. H. Davies, being duly sworn, on oath says, that he is Treasurer of the above-named petitioner; that he has read the foregoing petition subscribed by him on behalf of said petitioner and knows the contents thereof, and that the same is true of his own knowledge, except as to the

matters therein stated to be alleged on information and belief, and as to these matters he believes it to be true. 1326

W. H. DAVIES.

Subscribed and sworn to before me
this 18th day of February, 1921.

CELIA SACHS, 1327

Notary Public, New York County No. 8.

New York Register No. 2133.

My commission expires March 30, 1922.

(Seal)

68 Filed Feb. 19 1921 1328
C. W. Heggerson
Clerk

1329

1330

1331 *Petition for Leave to Intervene.*

At a Term of the District Court for the Northern District of New York, held at Norwich, N. Y. on the 19th day of February, 1921.

Present:

1332 Hon. MARTIN T. MANTON,
Circuit Judge.

Hon. GEORGE W. RAY,
Hon. JOHN R. HAZEL,
District Judges.

1333 THE STATE OF NEW YORK and CHARLES D. NEWTON, Personally and as Attorney-General of the State of New York,
Plaintiffs,

against

1334 THE UNITED STATES and others, Constituting the INTERSTATE COMMERCE COMMISSION,
Defendants.

Equity No. 295.

On reading and filing the petition of The Lehigh and Hudson River Railway Company,
1335 verified on the nineteenth day of February, 1921, praying for leave to intervene as a party defendant in the above entitled suit, now pending before this Court, and good cause appearing, it is

On motion of H. D. Noble, Jr., Solicitor for said petitioner,

Petition for Leave to Intervene. 1336

ORDERED that petitioner have leave to appear and intervene as a part defendant in the above entitled suit and to defend the same and be represented therein by counsel.

Dated, Norwich, N. Y., Northern District of New York, on this 19th day of February, 1921, at 11:30 o'clock, A. M. 1337

MARTIN T. MANTON,
Circuit Judge.

GEO. W. RAY,
JOHN R. HAZEL,
District Judges. 1338

U. S. DISTRCT COURT — NORTHERN DISTRICT OF NEW YORK.

THE STATE OF NEW YORK and CHARLES D. NEWTON, Personally and as Attorney-General of the State of New York, *Plaintiffs,* *against* THE UNITED STATES and others, Constituting the INTERSTATE COMMERCE COMMISSION, *Defendants.*	Equity No. 295.

1339

1340

Your petitioner, The Lehigh and Hudson River Railway Company, respectfully shows unto your honors,

1341 *Petition for Leave to Intervene.*

I

That it is a corporation organized and existing under the laws of the States of New York, New Jersey and Pennsylvania, and that it is a railroad corporation engaged in interstate and intrastate commerce and subject to the Inter-
1342 state Commerce Act.

II

That this suit is brought to restrain the enforcement, operation and execution of, and to set aside in whole, the report, findings and order of the Interstate Commerce Commission in a pro-
1343 ceeding had before said Commission entitled "In the Matter of the Rates, Fares and Charges of the New York Central Railroad Company and other Railroad Companies in the State of New York," known as I. C. C. Docket No. 11623, in which proceeding your petitioner was a party in interest, and in and by which order said Com-
1344 mission authorized and directed your petitioner, among others, to cease and desist from practising the undue prejudice, undue preference and advantage, and unjust discrimination found in the Commission's report therein to exist, and to put in force and maintain the increased passenger, baggage and milk and cream rates and the surcharge on parlor and sleeping car space intra-
1345 state in the State of New York, complained of in the Bill of Compaint filed in this cause.

III

Your petitioner has a substantial interest in the subject matter of this suit by reason of the

fact that if the enforcement, operation and execution of said report, findings and order are restrained and the same are set aside, your petitioner will lose and be deprived of large sums of money, amounting to many thousands of dollars annually, which it now is entitled to and receives from said increased rates, fares and charges.

Your petitioner therefore prays that it be granted leave to appear as a part defendant in the above entitled suit and be represented therein by counsel, in accordance with the provisions of the statute in such case made and provided.

February 18, 1921.

THE LEHIGH AND HUDSON ~~RIVER RY.~~ Railway Co.

By CLIFFORD S. BEATTIE,
Attorney.

H. D. NOBLE, JR.,
Solicitor for Petitioner,
Auburn, N. Y.

THE UNITED STATES OF AMERICA,
STATE OF NEW YORK,
COUNTY OF CHENANGO. } *ss.:*

Clifford S. Beattie, being duly sworn, on oath, says, that he is Attorney of the above named petitioner; that he has read the foregoing petition subscribed by him on behalf of said petitioner and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on

1351 information and belief, and as to those matters he believes it to be true.

CLIFFORD S. BEATTIE.

Subscribed and sworn to before me
this 19th day of February, 1921.

1352 FRANK S. POWELL,
Notary Public.

Filed Feb 19-1921. E. H. Higgason Clerk

U. S. DISTRICT COURT — NORTHERN DISTRICT OF NEW YORK.

1353 THE STATE OF NEW YORK and CHARLES D. NEWTON, Personally and as Attorney-General of the State of New York,
Plaintiffs,

against

1354 THE UNITED STATES and others, Constituting the INTERSTATE COMMERCE COMMISSION,
Defendants.

Equity No. 295.

Your petitioner Erie Railroad Company respectfully shows unto your honors

1355

I

That it is a corporation organized and existing under the laws of the State of New York and that it is a railroad corporation engaged in interstate and intrastate commerce and subject to the Interstate Commerce Act.

II

That this suit is brought to restrain the enforcement, operation and execution of, and to set aside in whole, the report, findings and order of the Interstate Commerce Commission in a proceeding had before said Commission entitled "In the Matter of the Rates, Fares and Charges of the New York Central Railroad Company and other Railroad Companies in the State of New York," known as I. C. C. Docket No. 11623, in which proceeding your petitioner was a party in interest, and in and by which order said Commission authorized and directed your petitioner, among others, to cease and desist from practicing the undue prejudice, undue preference and advantage, and unjust discrimination found in the Commission's report therein to exist, and to put in force and maintain the increased passenger, baggage and milk and cream rates and the surcharge on parlor and sleeping car space intrastate in the State of New York, complained of in the Bill of Complaint filed in this cause.

III

Your petitioner has a substantial interest in the subject matter of this suit by reason of the fact that if the enforcement, operation and execution of said report, findings and order are restrained and the same are set aside, your petitioner will lose and be deprived of large sums of money, amounting to many thousands of dollars annually, which it now is entitled to and receives from said increased rates, fares and charges.

Your petitioner therefore prays that it be

granted leave to appear as a party defendant in the above entitled suit and be represented therein by counsel, in accordance with the provisions of the statute in such case made and provided.

February 18, 1921.

ERIE RAILROAD COMPANY,

By GEO. F. BROWNELL,
Solicitor.

.....

Solicitor for Petitioner,
50 Church Street,
New York City, N. Y.

THE UNITED STATES OF AMERICA,
STATE OF NEW YORK,
COUNTY OF NEW YORK. } *ss.:*

Geo. H. Minor, being duly sworn, on oath says, that he is Vice-President of the above-named petitioner; that he has read the foregoing petition subscribed by him on behalf of said petitioner and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to these matters he believes it to be true.

(Signed) GEO. H. MINOR.

Subscribed and sworn to before me
this 18th day of February, 1921.

(Sgd.) A. L. TRAVIS,
Notary Public, No. 127, Kings County,
Certificate Filed in New York County
[L. S.] No. 85. My Commission Expires
March 30, 1921. N. Y. County Register's Office, No. 1190.

1366

At a Term of the District Court for the Northern District of New York, held at Norwich, N. Y., on the 19th day of February, 1921.

Present:

Hon. MARTIN T. MANTON, 1367
Circuit Judge.

Hon. GEORGE W. RAY,
Hon. JOHN R. HAZEL,
District Judges.

THE STATE OF NEW YORK and CHARLES D. NEWTON, Personally and as Attorney-General of the State of New York, *Plaintiffs,* *against* THE UNITED STATES and others, Constituting the INTERSTATE COMMERCE COMMISSION, *Defendants.*	Equity No. 295.

1368

1369

On reading and filing the petition of Erie Railroad Company, verified on the eighteenth day of February, 1921, praying for leave to intervene 1370 as a party defendant in the above entitled suit, now pending before this Court, and good cause appearing, it is

On motion of Geo. F. Brownell, Solicitor for said petitioner,

1371 *Petition for Leave to Intervene.*

Ordered that petitioner have leave to appear and intervene as a party defendant in the above entitled suit and to defend the same and be represented therein by counsel.

MARTIN J. MANTON,
Circuit Judge.

1372

GEO. W. RAY,
JOHN R. HAZEL,
District Judges.

Dated, Norwich, N. Y., Northern District of New York, on this 19th day of February, 1921, at 11:30 o'clock A. M.

1373

Filed Feb 19-1921- C. W. Higgins Clerk

U. S. DISTRICT COURT — NORTHERN DISTRICT OF NEW YORK.

THE STATE OF NEW YORK and CHARLES D. NEWTON, Personally and as Attorney-General of the State of New York, *Plaintiffs,* *against* THE UNITED STATES and others, Constituting the INTERSTATE COMMERCE COMMISSION, *Defendants.*	Equity No. 295.

1374

1375

Your petitioner, New Jersey and New York Railroad Company, respectfully shows unto your honors

Petition for Leave to Intervene. 1376

I.

That it is a corporation organized and existing under the laws of the States of New Jersey and New York and that it is a railroad corporation engaged in interstate and intrastate commerce and subject to the Interstate Commerce Act. 1377

II

That this suit is brought to restrain the enforcement, operation and execution of, and to set aside in whole, the report, findings and order of the Interstate Commerce Commission in a proceeding had before said Commission, entitled 1378
" In the Matter of the Rates, Fares and Charges of the New York Central Railroad Company and other Railroad Companies in the State of New York," known as I. C. C. Docket No. 11623, in which proceeding your petitioner was a party in interest, and in and by which order said Commission authorized and directed your petitioner, 1379
among others, to cease and desist from practicing the undue prejudice, undue preference and advantage, and unjust discrimination found in the Commission's report therein to exist, and to put in force and maintain the increased passenger, baggage and milk and cream rates and the surcharge on parlor and sleeping car space intrastate in the State of New York, complained of in 1380
the Bill of Complaint filed in this cause.

III

Your petitioner has a substantial interest in the subject matter of this suit by reason of the

1381 *Petition for Leave to Intervene.*

fact that if the enforcement, operation and execution of said report, findings and order are restrained and the same are set aside, your petitioner will lose and be deprived of large sums of money, amounting to many thousands of dollars annually, which it now is entitled to and receives

1382 from said increased rates, fares and charges.

Your petitioner therefore prays that it be granted leave to appear as a party defendant in the above entitled suit and be represented therein by counsel, in accordance with the provisions of the statute in such case made and provided.

February 18, 1921.

1383 NEW JERSEY AND NEW YORK R. R. ~~RAILROAD~~ COMPANY.

By GEO. F. BROWNELL,
Solicitor.

.....

Solicitor for Petitioner,

1384 50 Church Street,
New York City, N. Y.

THE UNITED STATES OF AMERICA,
STATE OF NEW YORK,
COUNTY OF NEW YORK. } *ss.:*

1385 Geo. H. Minor, being duly sworn, on oath, says, that he is Vice-President of the above-named petitioner; that he has read the foregoing petition subscribed by him on behalf of said petitioner and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on informa-

1386

tion and belief, and as to these matters he believes it to be true.

(Signed) GEO. H. MINOR.

Subscribed and sworn to before me
this 18th day of February, 1921.

1387

(Sgd.) A. L. TRAVIS.

Notary Public, No. 127, Kings County,
Certificate Filed in New York County,
[L.S.] No. 85. My Commission Expires
March 30, 1921. N. Y. County Register's Office, No. 1190.

1388

1389

1390

1391 *Petition for Leave to Intervene.*

At a Term of the District Court for the Northern District of New York, held at Norwich, N. Y., on the 19th day of February, 1921.

Present:

1392 Hon. MARTIN T. MANTON,
Circuit Judge.

Hon. GEORGE W. RAY,
Hon. JOHN R. HAZEL,
District Judges.

1393 THE STATE OF NEW YORK and CHARLES D. NEWTON, Personally and as Attorney-General of the State of New York,
Plaintiffs,

against

1394 THE UNITED STATES and others, Constituting the INTERSTATE COMMERCE COMMISSION,
Defendants.

Equity No. 295.

On reading and filing the petition of New
1395 Jersey and New York Railroad Company verified on the eighteenth day of February, 1921, praying for leave to intervene as a party defendant in the above entitled suit, now pending before this Court, and good cause appearing, it is

On motion of Geo. F. Brownell, Solicitor for said petitioner,

Petition for Leave to Intervene.

Ordered that petitioner have leave to appear and intervene as a party defendant in the above entitled suit and to defend the same and be represented therein by counsel.

MARTIN T. MANTON,
Circuit Judge.

GEO. W. RAY,
JOHN R. HAZEL,
District Judges.

Dated, Norwich, N. Y., Northern District of New York, on this 19th day of February, 1921, at at 11:30 o'clock A. M.

Filed Feb 19- 1921.
C. W. Haggerson
Clerk

At a Term of the District Court for the Northern District of New York, held at Norwich, N. Y., on the 19th day of February, 1921.

Present:

1402 Hon. MARTIN T. MANTON,
Circuit Judge.

Hon. GEORGE W. RAY,
Hon. JOHN R. HAZEL,
District Judges.

1403 THE STATE OF NEW YORK and CHARLES D. NEWTON, Personally and as Attorney-General of the State of New York,
Plaintiffs,

against

1404 THE UNITED STATES and others, Constituting the INTERSTATE COMMERCE COMMISSION,
Defendants.

Equity No. 295.

On reading and filing the petition of Lehigh
1405 Valley Railroad Company, verified on the eighteenth day of February, 1921, praying for leave to intervene as a party defendant in the above entitled suit, now pending before this Court, and good cause appearing, it is

On motion of H. D. Noble, Jr., Solicitor for said petitioner,

Petition for Leave to Intervene. 1406

Ordered that petitioner have leave to appear and intervene as a party defendant in the above entitled suit and to defend the same and be represented therein by counsel.

MARTIN T. MANTON,
Circuit Judge.

1407

GEORGE W. RAY,
JOHN R. HAZEL,
District Judges.

Dated, Norwich, N. Y., Northern District of New York, on this 19th day of February, 1921, at 11:30 o'clock, A. M.

1408

U. S. DISTRICT COURT—NORTHERN DISTRICT OF NEW YORK.

THE STATE OF NEW YORK and CHARLES D. NEWTON, Personally and as Attorney-General of the State of New York,
Plaintiffs,

1409

against

Equity No. 295.

THE UNITED STATES and others, Constituting the INTERSTATE COMMERCE COMMISSION,
Defendants.

1410

Your petitioner, Lehigh Valley Railroad Company, respectfully shows unto your Honors

1411 *Petition for Leave to Intervene.*

I

That it is a corporation organized and existing under the laws of the State of Pennsylvania and that it is a railroad corporation engaged in interstate and intrastate commerce and subject to the Interstate Commerce Act.

1412

II

That this suit is brought to restrain the enforcement, operation and execution of, and to set aside in whole, the report, findings and order of the Interstate Commerce Commission in a proceeding had before said Commission, entitled
1413 "In the Matter of the Rates, Fares and Charges of the New York Central Railroad Company and other Railroad Companies in the State of New York," known as I. C. C. Docket No. 11623, in which proceeding your petitioner was a party in interest, and in and by which order said Commission authorized and directed your petitioner,
1414 among others, to cease and desist from practicing the undue prejudice, undue preference and advantage, and unjust discrimination found in the Commission's report therein to exist, and to put in force and maintain the increased passenger, baggage and milk and cream rates and the surcharge on parlor and sleeping space intra-
1415 state in the State of New York, complained of in the Bill of Complaint filed in this cause.

III

Your petitioner has a substantial interest in the subject matter of this suit by reason of the

fact that if the enforcement, operation and execution of said report, findings and order are restrained and the same are set aside, your petitioner will lose and be deprived of large sums of money, amounting to many thousands of dollars annually, which it now is entitled to and receives from said increased rates, fares and charges.

Your petitioner therefore prays that it be granted leave to appear as a party defendant in the above entitled suit and be represented therein by counsel, in accordance with the provisions of the statute in such case made and provided.

February 18, 1921.

LEHIGH VALLEY RAILROAD COMPANY.

By H. D. NOBLE, JR.,
Solicitor for Petitioner.

H. D. NOBLE, JR.,
Solicitor for Petitioner.

Auburn. N. Y.

THE UNITED STATES OF AMERICA,
STATE OF NEW YORK,
COUNTY OF NEW YORK. } *ss.:*

F. L. Blendinger, being duly sworn, on oath says, that he is Vice-President of the above-named petitioner; that he has read the foregoing petition subscribed by him and on behalf of said petitioner and knows the contents thereof; and that the same is true of his own knowledge, except

as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

F. L. BLENDINGER.

Subscribed and sworn to before me this 18th day of February, 1921.

STANLEY R. MALLORY,

Notary Public, Kings County, No. 142. Certificate filed in New York County, No. 352. New York County Register's No. 2304. Kings County Register's No. 2159. My Commission expires March 30, 1922.

[SEAL]

Filed Feb 19 1921. Clk. Hughes Clerk

U. S. DISTRICT COURT—NORTHERN DISTRICT OF NEW YORK.

THE STATE OF NEW YORK and CHARLES D. NEWTON, Personally and as Attorney-General of the State of New York,

Plaintiffs,

against

THE UNITED STATES and others, Constituting the INTERSTATE COMMERCE COMMISSION,

Defendants.

Equity

Your petitioner, New York, Ontario and Western Railway Company, respectfully shows unto your honors

 1426

I

That it is a corporation organized and existing under the laws of the State of New York, and that it is a railroad corporation engaged in interstate and intrastate commerce and subject to the Interstate Commerce Act.

1427

II

That this suit is brought to restrain the enforcement, operation and execution of, and to set aside in whole, the report, findings and order of the Interstate Commerce Commission in a proceeding had before said Commission, entitled "In the Matter of the Rates, Fares and Charges 1428 of the New York Central Railroad Company and other Railroad Companies in the State of New York," known as I. C. C. Docket No. 11623, in which proceeding your petitioner was a party in interest, and in and by which order said Commission authorized and directed your petitioner, among others, to cease and desist from practising 1429 the undue prejudice, undue preference and advantage, and unjust discrimination found in the Commission's report therein to exist, and to put in force and maintain the increased passenger, baggage and milk and cream rates and the surcharge on parlor and sleeping car space intrastate in the State of New York, complained of 1430 in the Bill of Complaint filed in this cause.

III

Your petitioner has a substantial interest in the subject matter of this suit by reason of the

1431 *Petition for Leave to Intervene.*

fact that if the enforcement, operation and execution of said report, findings and order are restrained and the same are set aside, your petitioner will lose and be deprived of large sums of money, amounting to many thousands of dollars annually, which it now is entitled to and receives
1432 from said increased rates, fares and charges.

Your petitioner therefore prays that it be granted leave to appear as a party defendant in the above entitled suit and be represented therein by counsel, in accordance with the provisions of the statute in such case made and provided.

February 18, 1921.

1433 NEW YORK & WESTERN ~~RAILWAY~~ CO.

By C. L. ANDRUS,
Solicitor.

~~C. L. ANDRUS~~,
Solicitor for Petitioner.

1434

THE UNITED STATES OF AMERICA,
STATE OF NEW YORK,
COUNTY OF NEW YORK. } *ss.:*

1435 Richard D. Rickard, being duly sworn, on oath says, that he is Secretary of the above-named petitioner; that he had read the foregoing petition subscribed by him on behalf of said petitioner and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on

information and belief, and as to those matters 1436
he believes it to be true.

R. D. RICKARD.

Subscribed and sworn to before me
this 18th day of February, 1921.

CELIA SACHS, 1437

Notary Public, New York County,
No. 8. New York Register No. 2133.
[SEAL] My Commission expires March 30,
1922.

1438

1439

1440

1441 *Petition for Leave to Intervene.*

At a Term of the District Court for the Northern District of New York, held at Norwich, N. Y., on the 19th day of February, 1921.

Present:

1442 Hon. MARTIN T. MANTON,
Circuit Judge.

Hon. GEORGE W. RAY,
Hon. JOHN R. HAZEL,
District Judges.

1443 THE STATE OF NEW YORK and CHARLES D. NEWTON, Personally and as Attorney-General of the State of New York,
Plaintiffs,

against

1444 THE UNITED STATES and others, Constituting the INTERSTATE COMMERCE COMMISSION,
Defendants.

Equity No. 295.

On reading and filing the petition of the New
1445 York, Ontario and Western Railway Company, verified on the eighteenth day of February, 1921, praying for leave to intervene as a party defendant in the above entitled suit, now pending before this Court, and good cause appearing, it is

On motion of C. L. Andrus, Solicitor for said petitioner,

Petition for Leave to Intervene. 1446

Ordered that petitioner have leave to appear and intervene as a party defendant in the above entitled suit and to defend the same and be represented therein by counsel.

MARTIN T. MANTON,
Circuit Judge.

1447

GEO. W. RAY,
JOHN R. HAZEL,
District Judges.

Dated, Norwich, N. Y., Northern District of New York, on this 19th day of February, 1921, at ..... o'clock A. M.

1448

U. S. DISTRICT COURT — NORTHERN DISTRICT OF NEW YORK.

THE STATE OF NEW YORK and CHARLES D. NEWTON, personally and as Attorney General of the State of New York,
Plaintiffs,
against
THE UNITED STATES and others, Constituting the INTERSTATE COMMERCE COMMISSION,
Defendants.

1449

Equity No. 295.

1450

Your petitioner the Delaware, Lackawanna and Western Railroad Company respectfully shows unto your honors

1451 *Petition for Leave to Intervene.*

I

That it is a corporation organized and existing under the laws of the State of Pennsylvania and that it is a railroad corporation engaged in interstate and intrastate commerce and subject to the Interstate Commerce Act.

1452

II

That this suit is brought to restrain the enforcement, operation and execution of, and to set aside in whole, the report, findings and order of the Interstate Commerce Commission in a proceeding had before said Commission entitled "In
1453 the Matter of the Rates, Fares and Charges of the New York Central Railroad Company and other Railroad Companies in the State of New York," known as I. C. C. Docket No. 11623, in which proceeding your petitioner was a party in interest, and in and by which order said commission authorized and directed your petitioner, among
1454 others, to cease and desist from practicing the undue prejudice, undue preference and advantage, and unjust discrimination found in the Commission's report therein to exist, and to put in force and maintain the increased passenger, baggage and milk and cream rates and the surcharge on parlor and sleeping car space intrastate in the
1455 State of New York, complained of in the Bill of Complaint filed in this cause.

III

Your petitioner has a substantial interest in the subject matter of this suit by reason of the fact that if the enforcement, operation and execution

of said report, findings and order are restrained and the same are set aside, your petitioner will lose and be deprived of large sums of money, amounting to many thousands of dollars annually, which it now is entitled to and receives from said increased rates, fares and charges. 1456

Your petitioner therefore prays that it be granted leave to appear as a party defendant in the above entitled suit and be represented therein by counsel, in accordance with the provisions of the statute in such case made and provided. 1457

February 18, 1921.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, 1458

By W. G. VAN DE WATER,

Secretary and Treasurer.

W. S. JENNEY,

Solicitor for Petitioner.

1459

THE UNITED STATES OF AMERICA,
STATE OF NEW YORK,
COUNTY OF NEW YORK } *ss.:*

W. C. Van De Water, being duly sworn, on oath says, that he is Secretary and Treasurer of the above-named petitioner; that he has read the foregoing petition subscribed by him on behalf of said petitioner and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true. 1460

W. G. VAN DE WATER.

1461 *Petition for Leave to Intervene.*

Subscribed and sworn to before me
this 18th day of February, 1921.

MARY C. BODLE,
Notary Public, New York County.

New York County Clerk's No. 487.
1462 [SEAL] New York Co. Register's No. 1543.
Commission Expires March 30, 1921.

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1466

At a Term of the District Court for the Northern District of New York, held at Norwich, N. Y., on the 19th day of February, 1921.

Present:

Hon. MARTIN T. MANTON, 1467
Circuit Judge.

Hon. GEORGE W. RAY,
Hon. JOHN R. HAZEL,
District Judges.

THE STATE OF NEW YORK and CHARLES D. NEWTON, personally and as Attorney General of the State of New York, 1468
Plaintiffs,
against
THE UNITED STATES and Others, Constituting the INTERSTATE COMMERCE COMMISSION, 1469
Defendants.

Equity No. 295

On reading and filing the petition of The Delaware, Lackawanna and Western Railroad Company, verified on the eighteenth day of February, 1921, praying for leave to intervene as a party 1470 defendant in the above entitled suit, now pending before this Court, and good cause appearing, it is

On motion of W. S. Jenny, Solicitor for said petitioner,

ORDERED that petitioner have leave to appear

1471 and intervene as a party defendant in the above entitled suit and to defend the same and be represented therein by counsel.

MARTIN T. MANTON,
Circuit Judge.

1472 GEO. W. RAY,
JOHN R. HAZEL,
District Judges.

Dated, Norwich, N. Y., Northern District of New York, on this 19th day of February, 1921, at 11:30 o'clock A. M.

1473 Filed Feb 19-1921.
C. W. Higgins
Clerk

1474

1475

STENOGRAPHERS' MINUTES. 1476

At a Term of the Circuit Court, held in and for the Northern District of New York, on the 19th day of February, 1921, at the city of Norwich, New York, at the Chambers of the District Judge, at 11:00 A. M.

Present: 1477

HON. MARTIN T. MANTON,
Circuit Judge, Presiding,

HON. GEORGE W. RAY,
HON. JOHN R. HAZEL,
District Judges.

UNITED STATES DISTRICT COURT — 1478
NORTHERN DISTRICT OF NEW YORK.

No. 295.

THE STATE OF NEW YORK and CHARLES D. NEWTON, Personally and as Attorney-General of the State of New York, 1479

against

THE UNITED STATES and EDGAR E. CLARK, CHARLES C. MCCHORD, BALTHASER H. MEYER, HENRY C. HALL, WINTHROP M. DANIELS, CLYDE B. ACHESON, ROBERT E. WORLEY, JOSEPH B. EASTMAN, 1480
HENRY J. FORD and MARK W. POTTER, Constituting the Interstate Commerce Commission, Defendants, and Nine Railroad Defendants Intervening.

1481 *Stenographers' Minutes.*

APPEARANCES:

Edward F. Griffin, Esq., Deputy Attorney-General for the State of New York.

George L. Meade, Deputy Attorney-General for the State of New York.

Blackburn Esterline, Esq., Special Assistant to
1482 the Attorney-General for the United States.

P. J. Farrell, Esq., Chief Counsel for the Interstate Commerce Commission.

Walter C. Noyes, Esq., for the Delaware & Hudson Company.

By Mr. Noyes.— Before offering any proof, I would like to present on behalf of the Delaware
1483 & Hudson Company, petition to intervene and I wish to call attention to the Statute. The Judicial Code provides: (Mr. Noyes read to the Court sections 1005 and 1012 and other excerpts from the Code.) Under the Statute they have a right to intervene as a matter of right.

1484 Judge Manton.— Are there any other railroads that want to intervene?

Mr. Griffin.— There is no objection.

Mr. Waldron.— On behalf of the Delaware & Hudson Company and the Schoharie Valley Railway Company and the Greenwich & Johnsonville Railway Company, we ask to intervene.

1485 C. L. Andrus.— On behalf of the Erie Railroad Company, New York, Ontario & Western Railroad Company and the New Jersey & New York Railroad Company, we ask to intervene.

H. D. Noble, Jr.— On behalf of the Lehigh Valley Railroad Company and the Lehigh & Hudson River Railway Company, we ask to intervene.

1486 W. S. Jennings.— On behalf of the Delaware, Lackawanna & Western Railroad Company, we ask to intervene.

Judge Manton.— Are there any others?

Mr. Griffin.— I would like to have it appear on the record that the State of New York has sent 1487 copies of the pleadings to the railroad companies who have asked for them, and the Attorney-General asks that the Court order that notice be served to all the railroad companies involved in this order that they may have the right to appear herein if they care to be heard.

Judge Manton.— They can come in as they 1488 wish. I don't know of any duty on the part of the Court to send them notice.

Mr. Griffin.— I simply wanted my disposition in the matter noted on the record.

This is an application for an interlocutory injunction, and we ask for the relief prayed for 1489 upon the petition and bill of complaint and the order to show cause filed January 1, 1921, at 12:00 P. M.

Judge Manton.— Beyond the questions raised as to the jurisdiction of the Court, the question involved in this case is precisely the same involved as in the case of the railroad. Do you wish to 1490 offer any exhibits or proof on any question?

Mr. Griffin.— No, sir, I have nothing.

Blackburn Esterline.— I represent the United States. Mr. P. J. Farrell, the chief counsel of the Interstate Commerce Commission, represents

1491 *Stenographers' Minutes.*

the Interstate Commerce Commission, and has filed an answer on behalf of the Commission. I have filed and served an answer upon opposing counsel. In his bill of complaint, the Attorney-General of the State of New York refers to by title number and otherwise the report of the In-
1492 terstate Commerce Commission in what will be known throughout this case as Ex Parte 74. In order that there may be no question but that the report and order of the Interstate Commerce Commission may become a part of the record I formally offer it.

Judge Manton.— He has pleaded it and offered
1493 it as an exhibit.

Mr. Griffin.— Not Ex Parte 74, that was Ex Parte 11623. I claim that no part of the evidence taken in Ex Parte 74 is competent, material or relevant here.

Mr. Esterline.— He has attached to his bill a
1494 copy of the report and order of the Interstate Commerce Commission in 11623, in the matter of rates, charges, etc., of the New York Central and other railroad companies, subject to verification, he having offered it and printed it, we ask that it be considered as formally offered. I offer copy of the opinion of the Public Service Commission
1495 of the State of New York Second District, in the matter of the petition or complaint of the New York Central Railroad Company, also the Delaware, Lackawanna and Western Railroad Company, the Lehigh Valley Railroad and other steam railroads in respect to proposed higher passenger

fares dated August 10, 1920, referred to as Ex Parte No. 7704. 1496

I now offer freight rate order known as In the Matter of the petition or complaint of the New York Central Railroad Company, also the Delaware, Lackawanna & Western Railroad Company, the Lehigh Valley Railroad company and other steam railroads in respect to proposed higher passenger fares; also the opinion of the Public Service Commission of the State of New York, Second District, decided August 19, 1920, and further referred to as case No. 7704. This copy which I have bears the earmarks of the official document of the Public Service Commission of the State of New York, and I assume you accept it as one of its publications. 1497 1498

Mr. Griffin.— There is no objection to it as not being a true copy, but it is objected as incompetent, immaterial and irrelevant generally and specifically upon the ground it is not within the scope of the pleadings and has nothing to do with No. 11623. 1499

Mr. Esterline.— Where I made the other offer, I meant 526. It shows that on Ex Parte 74 and the whole record and for the same reasons the Public Service Commission of the State of New York allowed a similar increase in the freight rates and did not in the cream and passenger rates. 1500

Judge Manton.— There is a provision in the Transportation Act which would require you to first apply to the Interstate Commerce Commission and then request the Public Service Commission to make the rates the same.

1501 Mr. Esterline.— Yes, but the purpose of this offer is to show that all these objections which they are raising against the increase in the passenger rates did not exist with respect to the freight rates under substantially similar circumstances.

1502 Mr. Griffin.— That is going a long ways, and we make the same objection as heretofore made.

Judge Manton.— I think it is admissible, we will take it.

Mr. Griffin.— Exception.

Mr. P. J. Farrell.— Turning to paragraph 8 of
1503 the Commission's answer, on page 5, you will observe the Commission specifically denied the record stated in the petition was the record here involved, and I therefore submit in evidence in support of paragraph 8 of the Commission's answer, certificate of the Secretary of the Interstate Commerce Commission showing that Ex
1504 Parte 74, in other words, the record in Ex Parte 74, was before the Commission and therefore is here.

Mr. Griffin.— I object to it as incompetent, irrelevant and immaterial generally, and specifically upon the ground that no part of Ex Parte 74 was actually referred to by the Commission in
1505 its decision, except so much as was specifically referred to by Commissioner Ford.

Judge Manton.— Overruled.

Mr. Griffin.— Exception.

Mr. Griffin.— In connection with the last offer of Mr. Esterline, taken over my objection, I insist

1506 if the opinion be taken the order of the Commission in connection with that exhibit be submitted in evidence by Mr. Esterline.

Mr. Esterline.— Will you supply it?

Mr. Griffin.— Yes, I will supply it, but it is understood I am not offering it.

1507 By Mr. Noyes.— The defendant carriers as intervenors join in the answer of the Interstate Commerce Commission, except that they admit and don't aver information insufficient to form a belief that they are demanding and collecting the increased rates and charges alleged in paragraph 18 of the bill of complaint. We feel we ought to 1508 join in the pleadings.

Judge Manton.— Do you expect to submit formal answer?

Mr. Noyes.— If your Honors are willing, that might stand as our answer, it would save delay.

Judge Manton.— Then it may be considered your answer.

1509

Mr. Griffin.— Is that the answer of all the intervenors?

Mr. Noyes.— Yes.

Judge Manton.— If there is no other proof, then evidence is closed.

1510 Mr. Griffin.— If the Court please, I have prepared a brief of 179 pages and perhaps the presiding judge will indicate to me how far and to what extent an oral argument will be helpful in this case, so I will not dwell upon things which may be read as well as heard.

1511 Judge Manton.— Speaking for myself, I would like to hear you further on the subject of the intrastate roads. I think we can say the Court has jurisdiction.

Oral argument by Mr. Griffin.
Oral argument by Mr. Esterline.
Oral argument by Mr. Farrell.
1512 Oral argument by Mr. Noyes.
Oral argument by Mr. Brownell.
Oral argument by Mr. Griffin.

Judge Manton.— I think the Court should hold a recess until 4:00 o'clock and render a decision at that time.

1513 At 4:00 P. M. Judge Manton rendered the following decision:

The Court has decided after recess to consider the matter further and we will hand down an opinion the early part of the week.

Mr. Noyes.— The injunction order which you have granted provides that it shall continue —
1514 will your Honors make the order that the injunction will continue until the decision of the case.

Judge Manton.— Yes, the decision in each case, that is, the injunction in each case may continue until the Court hands down its decision, or until the further order of the Court.

1515 Mr. Noyes.— We have already prepared an order, and we hope it will not be considered presumptuous on our part if we hand in the order that we have prepared in this matter.

Judge Manton.— You may hand it in. Judge Hazel suggests that it was understood that this

1516 is a determination of the application for a preliminary injunction in each case. Is there any way in which you can or want this made into a final hearing?

Mr. Farrell.— Our answer asks for a dismissal of the petition.

1517 Judge Manton.— On stipulation we might consider it as a final hearing.

Mr. Griffin.— Under the practice I am allowed a direct appeal to the United States Supreme Court upon the denial of the interlocutory injunction. I don't want to do anything that will cut off the appeal.

1518 Mr. Noyes.— As far as the carriers are concerned, counsel are all agreed that we only ask for a preliminary injunction. We won't involve the case at all. We have drawn our proposed order simply granting an interlocutory injunction, and it is simply along those lines.

1519 Judge Manton.— For the purpose of the record we will consider in the case in which the several railroads are plaintiff that it is an application for a temporary injunction and in the case of the State of New York against the United States and the Public Service Commission we shall consider the application for an injunction, also the motion made on behalf of the defendant to dismiss the 1520 appeal.

Filed Feb. 28 - 1921

C. B. Stoggniere

Clerk

1521 **DEFENDANTS' EXHIBIT**

EX PARTE 74.

In the Matter of the APPLICATIONS OF CARRIERS IN OFFICIAL, SOUTHERN, AND WESTERN CLASSIFICATION TERRITORIES for Authority
1522 to Increase Rates.

(Ex. J.)

Submitted July 6, 1920. Decided July 29, 1920.

Certain increases authorized in rates, fares and charges of carriers in the teritorial rate groups defined in the report.

1523 John E. Benton for various state commissions; John T. Boifeuillet for Railroad Commission of Georgia; R. Hudson Burr for Florida Railroad Commission; Hance H. Cleland for Public Service Commission of Washington; A. E. Helm for Court of Industrial Relations, State of Kansas; J. H. Henderson for Iowa Board of Railroad
1524 Commissioners; Henry R. Trumbower for Railroad Commission of Wisconsin; J. J. Murphy, D. E. Brisbine, J. W. Raish, D. L. Kelley, and Oliver E. Sweet for South Dakota Board of Railroad Commissioners; Dozier A. DeVane for Florida Railroad Commission and fruit and vegetable interests of Florida; J. F. Shaughnessy for Public Service Commission of Nevada et al.;
1525 J. B. Campbell for Spokane Merchants' Association, Spokane Chamber of Commerce, Intermediate Rate Association, et al.; Mason Manghum for Virginia Corporation Commission; A. G. Flynn and Henry C. Flannery for Minnesota Railroad & Warehouse Commission; Frank Rober-

son and M. C. Moore for Mississippi Railroad 1526
Commission; W. M. Barrow for Railroad Commission of Louisiana; and Raymond L. Givens for Idaho Public Utilities Commission.

C. J. Austin for New York Produce Exchange; C. S. Bather for Illinois District Traffic League et al.; Alfred Brandeis for Louisville Board of 1527
Trade et al.; J. S. Brown for Chicago Board of Trade; Butler, Lamb, Foster & Pope for California Citrus League, American Fruit & Vegetable Association, et al.; Graddy Cary for National Live Stock Shippers League; M. M. Caskie for Montgomery (Ala.) Chamber of Commerce; Chas. E. Cotterill for Southern Traffic League; S. H. Cowan for American National Live Stock Asso- 1528
ciation, National Live Stock Shippers League, and Union Stock Yards, Chicago, Ill.; W. S. Creighton for Charlotte Shippers & Manufacturers Association and Charlotte Chamber of Commerce; R. M. Field for National Industrial Traffic League and Illinois District Traffic League; J. H. Fishback, A. L. Cox, and M. R. 1529
Beaman for North Carolina Traffic Association; R. C. Fulbright for Southwestern Industrial Traffic League, Texas Industrial Traffic League, et al.; John C. Graham for Michigan Traffic League and Jackson (Mich.) Chamber of Commerce; F. H. Harwood for Illinois Coal Traffic Bureau; George Heaps, Jr., for Iowa Coal Opera- 1530
tors Association; G. Stewart Henderson for Baltimore Chamber of Commerce and Canned Goods Exchange of Baltimore; T. M. Henderson for Traffic Bureau of Nashville, Tenn.; Francis B. James, E. E. Williamson, M. F. Gallagher, Earl

1531 B. Wilkinson, and Ewing H. Scott for National Paving Brick Manufacturers Association et al.; V. O. Johnston, Gary E. Sutton, and O. P. Gothlin for National Association of Sand & Gravel Producers; J. C. Lincoln and W. H. Connell for Traffic Bureau, Merchants' Association of New
1532 York; Frank Lyon and W. A. Prinsen for Northwestern Coal Dock Operators Association; James B. McGinnis for Memphis Merchants Exchange and Memphis Chamber of Commerce; James S. Marvin for National Automobile Chamber of Commerce; Ralph Merriam for American Farm Bureau Federation; Harry T. Moore for Atlanta Freight Bureau; J. A. Morgan for Houston
1533 Chamber of Commerce et al.; J. V. Norman for Southern Hardwood Traffic Association, West Kentucky Coal Bureau, Louisville Board of Trade, et al.; Edgar J. Rich for Associated Industries of Massachusetts et al.; R. W. Ropiequet for Coal Operators Association of Illinois and Chicago Common Brick Manufacturers; S. C.
1534 Rowe for Cattle Raisers Association of Texas; Leslie C. Smith for National Association of Ice Industries; Clifford Thorne for Western Petroleum Refiners Association, American Farm Bureau Federation, American Independent Petroleum Association, National Live Stock Shippers League, National Farm Grain Dealers
1535 Association, and Corn Belt Meat Producers Association; A. F. Vandegrift for Louisville Board of Trade; and George P. Wilson for Philadelphia Chamber of Commerce. Joseph N. Teal, William C. McCulloch, and Rogers MacVeagh for West Coast Lumbermen's Associa-

tion and California Redwood Association; F. G. Donaldson for Williamette Valley Lumbermen's Association; C. S. Hoskins for Tampa Board of Trade and Southern Traffic League; Henry T. Clark for Omaha Grain Exchange; S. B. Houck for National Retail Coal Merchants Association; S. B. Houck and W. A. Holley for Central Illinois Coal Traffic Bureau; and C. R. Hillyer for Chicago Coal Merchants Association, Chicago Live Stock Exchange, National Live Stock Exchange et al. 1536 1537

William A. Wimbish and Wade H. Ellis for Atlanta Freight Bureau et al.; Morgan J. Parlin for Belknap Hardware & Manufacturing Company; Frank E. Williamson for Buffalo Chamber of Commerce; Ben Stone for Illinois Sand & Gravel Producers Association; P. W. Coyle for St. Louis Chamber of Commerce; Geo. M. Cummins for Davenport Commercial Club et al.; V. W. Krafft for Associated Cooperage Industries of America; J. H. Alldredge for Dothan Chamber of Commerce; H. W. Prickett for Chamber of Commerce and Commercial Club of Salt Lake and Traffic Bureau of Utah; John S. Burchmore and Luther M. Walter for Gypsum Industries Association et al.; D. C. McMullin for Palatka (Fla.) Business Men's Association; W. H. Young for Nebraska Potash Producers Association; Joseph H. Beek for National Industrial Traffic League et al,; Sims, Welch & Godman and C. R. Hillyer for Chicago Coal Merchants Association; C. D. Boyd for Harlan, Hazard & South Appalachia Coal Operators Association; Hubert B. Fuller for American Sand Association; W. R. 1538 1539 1540

Defendants' Exhibit.

Scott for Board of Trade and Chamber of Commerce of Kansas City, Mo.; E. H. Hogueland for Southwestern Millers League; D. L. Yerkes for Alabama Coal Operators' Association; John S. Burchmore, John Rice, A. P. Sandles, L. H. Hawblitz, E. J. Krause, A. J. Sullivan, and F. W. Schmidt for National Crushed Stone Association; Walter E. McCornack for interior Iowa packers and Bedford Stone Club, Bedford, Ind.; R. C. Fulbright, A. G. T. Moore, and C. E. Cotterill for Southern Pine Association; C. H. Rodehaver for National Basket & Fruit Packing Manufacturers' Association; Ray Williams for Cairo Association of Commerce et al.; U. S. Musick for Cairo Association of Commerce et al.; J. J. Wait, T. H. Eddy, Joseph R. Noal, A. A. Sprague, Donald Ryerson, John T. Pirie, and Butler, Lamb, Foster & Pope for Chicago Association of Commerce; James G. Wilson and J. Curtis Robinson for North Pacific Fruit League; Fayette B. Dow and George W. Field for National Terra Cotta Society; and C. E. Warner for Southwestern Interstate Coal Operators' Association et al.

Glenn E. Plumb for Organized Railway Employees of America.

Charles S. Belsterling for Carnegie Steel Company et al.; Charles D. Drayton for Coca-Cola Company; William Hatch for Peerless Portland Cement Company; Arthur B. Hayes, L. O. Evans, and Warren Nichols for American Smelting & Refining Company et al.; J. F. Lockley for Newaygo Portland Cement Company; Frank Lyon and Walter Young for Atlas Portland Cement Company; T. F. McClaren for Peninsular Portland Cement Company; F. E. Paulson for Lehigh

Defendants' Exhibit.

Portland Cement Company; N. S. Potter, Jr., for Portland Cement Company; Luther M. Walter, John S. Buchmore, and S. D. Boylston for American Beet Sugar Company et al.; C. F. Vandenover for Southern Minnesota Mills; W. W. Collin, jr., John S. Burchmore, and Borders, Walter, Burchmore & Collin for Jones & Laughlin Steel Company et al.; H. M. Wade for Redwood Manufacturing Company and Casper Lumber Company; J. Sharp Wilson for Crescent Portland Cement Company; W. H. Miller for Indian Refining Company; Fayette B. Dow and F. W. Boltz for American Oil Works et al.; W. A. Becker for Diamond Match Company; Geo. H. Tower for Standard Oil Company (N. J.); Frank M. Swacker for Mexican Petroleum Corporation, Asphalt Association et el.; Butler, Lamb, Foster & Pope, by Ernest S. Ballard, for Steel & Tube Company of America and By-Products Coke Corporation; Lyman M. Bass, Locke, Babcock, Spratt & Hollester, and Carmalt, Hagerty & Wheeler for Lackawanna Steel Company, Donner Steel Company, Rogers Brown Iron Company, Buffalo Union Furnace Company, and Wickwire Spencer Steel Corporation; I. W. Rowzer and James Bowron for Alabama Company, Gulf States Steel Company, Sloss-Sheffield Steel & Iron Company, Woodstock Iron Corporation, Sheffield Iron Corporation, and Republic Iron & Steel Company; and C. R. Marshall and Charles E. Bell for Acme Manufacturing Company of Wilmington, N. C., Planters Fertilizer & Phosphate Company et al. 1546 1547 1548 1549 1550

Alfred P. Thom for Association of Railway Executives and General Rate Committee of the

1551 association; Fred H. Wood, Charles Donnelly, S. T. Bledsoe, W. F. Dickinson, O. W. Dynes, and C. S. Burg for lines in western classification territory; R. V. Fletcher and Charles J. Rixey, jr., for southern and eastern carriers; Francis I. Gowen, chairman, and John C. Bills, Hugh L. Bond, jr., W. S. Bronson, Clyde Brown, N. S.
1552 Brown, Geo. F. Brownell, E. G. Buckland, and R. V. Fletcher, committee of counsel for lines in official classification territory; B. B. Cain and S. S. Ashbaugh for American Short Line Railroad Association; H. G. Herbel, W. F. Dickinson, and C. S. Burg for Southwestern Railway Executives'
1553 Association; Charles H. Blatchford, George S. Hobbs, Charles C. Paulding, George D. Dixon, Alexander H. Elder, B. H. Harris, G. W. Ingalls, S. H. Johnson, S. G. Lutz, J. B. Payne, L. J. Spence, J. D. Watson, Levy Mayer, A. A. McLaughlin, W. A. Cole, J. C. Murray, and Henry S. Hart for individual respondents.

1554 REPORT OF THE COMMISSION.

BY THE COMMISSION:

In this proceeding the carriers by railroad subject to our jurisdiction seek authority, pursuant to the provisions of section 15a of the interstate commerce act, to increase their freight revenues to a basis that will enable them to earn an aggre-
1555 gate annual net railway operating income equal, as nearly as may be, to 6 per cent upon the aggregate value of the railway property of such carriers held for and used in the service of transportation. The applications, which were filed in the latter part of April and the early part of May,

1920, were made at our suggestion to assist us 1556
in complying with the provisions of that section. Similar applications were filed on the part of certain carriers by water. Hearings were held in Washington in May, June, and July, 1920, and the case was submitted upon briefs and oral argument on July 6, 1920. In accordance with the provisions of paragraph 3 of section 13 of the 1557
interstate commerce act we invited the state commissions to cooperate with us in this proceeding, and there were appointed three representatives of those commissions, Hon. William D. B. Ainey, chairman of the Public Service Commission of Pennsylvania; Hon. Royal C. Dunn, of the Railroad Commission of Florida; and Hon. Jno. A. 1558
Guiher, of the Railroad Commission of Iowa, who sat with us throughout the hearings and oral argument and joined with us in conferences antecedent to our determination of the matters in issue.

Section 15a of the interstate commerce act provides that in exercising our powers under that section we shall "initiate, modify, establish, or 1559
adjust" rates for the carriers as a whole, "or as a whole in each of such rate groups or territories as the Commission may from time to time designate." We accordingly assigned for oral argument on March 22, 1920, the question, among others, "whether for the purposes of said section 15a the rate adjustment shall be made for the 1560
carriers as a whole, or by rate groups or territories to be designated by the Commission, and if the latter, what rate groups or territories shall be so designated." The preponderance of opinion was that the boundaries of official, southern, and western classification territories should be ob-

served, and that three groups should be designated accordingly. In making their proposals in this proceeding the carriers have observed generally those three groups, but the carriers in New England and in the southwest have brought to our attention the peculiar financial needs of the railroads in those territories. The New England carriers do not propose a change in the grouping suggested by the carriers generally, but certain of the southwestern lines ask that we carve out of the western territory a separate southwestern group. This separate application of the southwestern lines is opposed by many shippers served by these carriers and by other carriers in the western group.

The record shows that the principal railroads serving the territory west of the Colorado common points, especially the so-called transcontinental railroads as a whole, are in a substantially better financial condition than other carriers in the western territory. It also shows that the rates, generally speaking, are materially higher in the region west of the Colorado common points than in the part of the western territory lying east thereof. Considering the whole situation it is our view that the territory west of the Colorado common points and the traffic to and from that territory may properly be given separate treatment.

We find that for the purposes set forth in section 15a the groups should be as follows:

Eastern Group.

Its limits for the purposes of this proceeding may be established as follows: The Atlantic seaboard from the Canadian border

Defendants' Exhibit.

to Norfolk, Va., the main line of the Norfolk & Western Railway from Norfolk, Va., to Kenova, W. Va., the main line of the Chesapeake & Ohio Railway from Kenova, W. Va., to Cincinnati, Ohio, the Ohio River to Cairo, Ill., the Mississippi River to the mouth of the Illinois River, at or near Grafton Ill., the Illinois River from Grafton, Ill., to Perkin, Ill., a line south and east of the Atchison, Topeka & Santa Fe Railway from Pekin, Ill., through Joilet and Streator, Ill., to Chicago, Ill., a line drawn from Chicago, Ill., to include the southern peninsula of Michigan, and thence following the international boundary to the Atlantic seaboard; including that portion of the Virginian Railway extending south of the southern boundary, and excluding those portions of the Southern Railway, Louisville & Nashville Railroad, Mobile & Ohio Railroad, Atlantic Coast Line Railroad and Seaboard Air Line extending north of the southern boundary. 1566 1567 1568

Southern Group.

The territory commonly known as the southern classification territory, embracing that section of the United States lying west of the Atlantic Ocean; south of the main line of the Norfolk & Western Railway from Norfolk, Va., to Kenova, W. Va., thence south of the Chesapeake & Ohio Railway to Cincinnati, and thence south of the Ohio River to Cairo, Ill.; thence east of the Mississippi River to New Orleans, La., and the mouth of the Mississippi River; and north of the Gulf of Mexico from the Mississippi River to the Atlantic Ocean; including also those portions of the Southern Railway, Louisville & Nashville Railroad, Mobile & 1569 1570

1571 *Defendants' Exhibit.*

Ohio Railroad, Atlantic Coast Line Railroad, and Seaboard Air Line Railway extending north of the northern boundary and excluding that portion of the Virginian Railway extending south of the northern boundary.

Western Group.

1572 The territory lying west of the western boundaries of the eastern and southern groups as above described; south of Lake Superior and of the international boundary line; north of the Gulf of Mexico and the Rio Grande, and on and east of a north and south line running as follows: Following the boundary line between the State of North
1573 Dakota and the State of Montana and the boundary line between the States of South Dakota and Wyoming and Nebraska and Wyoming to the line of the Union Pacific extending east from Cheyenne, Wyo.; then following the line of the Union Pacific westward to Cheyenne and from Cheyenne running southward through Denver, Colorado
1574 Springs, Pueblo, and Trinidad, Colo.; then following the line of the Atchison, Topeka & Santa Fe Railway through Raton and Las Vegas, N. Mex., to Albuquerque, N. Mex.; then south along the line of the Atchison, Topeka & Santa Fe Railway to El Paso, Tex.

Mountain-Pacific Group.

1575 All that territory lying between the line last described and the Pacific coast, not including Alaska.

The grouping herein approved differs somesomewhat from that proposed by the carriers, and, inasmuch as the record deals principally with

1576 the three major groups, it will be advisable to deal with the evidence as presented. In analyzing the results of operation for the various groups of carriers for the constructive year devised by them, and for the first four months of 1920, we shall group the carriers as they were grouped in the applications filed in this proceeding.

1577 Paragraph (3) of section 15a is as follows:

> The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission. In making such determination 1578 it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient, and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation: *Provided*, That during the 1579 two years beginning March 1, 1920, the Commission shall take as such fair return a sum equal to 5½ per centum of such aggregate value, but may, in its discretion, add thereto a sum not exceeding one-half of one per centum of such aggregate value to make provision in whole or in part for improvements, betterments or equipment, which, according to the accounting system prescribed by the 1580 Commission, are chargeable to capital account.

In establishing rates for the two-year period we have no discretion as to the amount of the fair return except that we may add to the 5½ per

1581 *Defendants' Exhibit.*

centum provided by law " a sum not exceeding one-half of 1 per centum of such aggregate value to make provision in whole or in part for improvements, betterments, or equipment, which, according to the accounting system prescribed by the Commission, are chargeable to capital account."

1582 Having determined the per cent, we are called upon to perform the administrative task of establishing rates that will yield in the aggregate as nearly as may be that per cent until March 1, 1922.

Evidence has been submitted tending to show that we should accord to the carriers the maxi-

1583 mum per cent authorized by the Congress. The high rates of interest now prevailing are cited by the petitioners, and our attention is called to prominent instances where large railroads were recognized with financial standing have been obliged within recent months to pay interest rates well in excess of 6 per cent on new capital. The

1584 evidence shows that the New York Central Railroad Company recently sold $36,000,000 of 15-year equipment notes, carrying an interest rate of 7 per cent, and that notes carrying the same rate of interest were sold by other carriers, as follows: Pennsylvania Railroad Company, $50,000,000 of 10-year collateral notes; Northern Pacific Railroad $4,500,000 of 10-year

1585 equipment notes; Atlantic Coast Line Railroad, $6,000,000 of 10-year collateral notes; Louisville & Nashville Railroad, $7,500,000 of 10-year collateral notes. Discounts and commissions raised the total cost of the capital to these carriers to 7½ per cent per annum.

Defendants' Exhibit. 1586

EFFICIENCY IN OPERATION.

Much has been said upon the present record concerning the necessity of additional equipment and the efficiency of the present management of the carriers. It is the view of the carriers that existing facilities the inadequate, and they state specifically that they need immediately at least 1587
100,000 freight cars, 2,000 locomotives, and 3,000 passenger cars. Shippers are unanimously of the opinion that the transportation service has been and is unsatisfactory, and many of them urge upon the necessity of granting such increased rates as may be necessary in order that the service may be improved. Others raise the 1588
question whether considerations other than inadequacy of facilities — notably labor difficulties — are not equally responsible for the admittedly poor service. Especially during recent months a shortage of labor at crucial points, due in part to strikes, has contributed more largely than any other single factor to the unsatisfactory 1589
condition that has existed and still exists. Witnesses for the carriers are unable to state explicitly what economies in operation, if any, may be presently effected. On the other hand, the opinion was expressed that certain increases in operating expenses are apparently unavoidable. During the war passenger traffic was unusually 1590
remunerative because of troop movements, elimination of unnecessary trains, and heavy loading of passenger cars. The movement of troops has practically ceased, and it is the view of the carriers that a larger number of passenger trains will have to be operated. During the war, in part

1591 because of war necessity, there was a marked increase in the loading of freight cars. It is apparent that there may be increases in expenses not related to the general increase in prices, which may offset any economies that may be effected in other directions.

1592 PROPERTY INVESTMENT.

The calculations of the carriers as to the increases in revenue needed by them are predicated upon the assumption that the Commission should permit a return of 6 per cent on the book figures for investment in road and equipment, improvements on leased railway property, materials, and
1593 supplies and government allocated equipment, hereinafter referred to as book cost. Their contention is that the aggregate value of the property of the carriers in each group, held for and used in the service of transportation, is substantially in excess of the aggregate of the amounts shown as their respective book costs.

1594 The carriers recognize the infirmities inherent in the investment accounts as carried upon the books of the carriers, as a measure of the value of the respective properties taken separately; but they contend that it is appropriate for us to use the aggregate of such figures as the basis of our calculations, tested in the light of the work
1595 of our bureau of valuation as thus far progressed, the tendencies thereby shown, and the conclusions to be drawn therefrom by those familiar with the work so far done, and also by consideration of such matters of common knowledge or within the knowledge of the Commission as bear upon the subject.

Defendants' Exhibit. 1596

The aggregate amount carried as book cost of road and equipment by all classes of carriers reporting to us, as of December 31, 1919, is set out below according to the territorial groups defined in the application of the carriers:

Eastern group	$9,038,194,615
Southern group	2,183,923,124
Western group	8,818,454,872
Total, all groups	$20,040,572,611

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In the admnstraton of section 15a of the interstate commerce act it becomes necessary for us to determine, as nearly as may be, the aggregate value of the railway property of the carriers defined in that section, held for and used in the service of transportation. In making this determination, we are authorized to utilize the results of our investigation under section 19a of the act, in so far as we deem such results available; and we are required to give due consideration to all the elements of value recognized by the law of the land for rate-making purposes, and are required to give to the property investment account of the carriers only that consideration, which, under such law, it is entitled to in establishing values for rate-making purposes.

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Considerable evidence of a general character as to the various elements of value has been produced herein, which we have carefully scrutinized.

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While the valuation of the railroads under section 19a of the interstate commerce act is still incomplete, the work has progressed so far that the results are of value and informative in reaching the determination we are now required to

make. So far as the work has produced results, either as to particular roads, or as showing general tendencies and principles, we have given consideration thereto. As will appear from examination of our various valuation reports, and from section 19a itself, our investigations under that section are designed to give information as to the original cost of the property, the cost of reproduction new, the accrued depreciation, the amount of the investment, the corporate histories of the properties, the values of the lands, and other values and elements of value, if any.

We have also before us the investment accounts of the carriers. Since 1907 there have been mandatory regulations by us as to the manner in which the investment accounts should be kept. In the administration of section 20 of the interstate commerce act we have had frequent occasion to investigate, and in many cases to correct, errors apparent in the investment accounts; other errors have been discovered and brought to our attention in the progress of the work of valuation under section 19a.

The probable earning capacity of the properties under particular rates prescribed by law and the sums required to meet operating expenses, separately and collectively, are indicated in the record.

There is also evidence which tends to show the amount and market value of the bonds and stocks of the carriers.

In properly appraising all these elements of value we are mindful of the fact that the carriers are operating units and going concerns. This fact has been given due consideration in the light

of the financial history of the transportation system of the United States, as developed by the record and as known to us. The needs for working capital, and materials and supplies on hand have been considered and allowance therefor has been made. 1606

From a consideration of all of the facts and matters of record, and those which, under section 15a of the interstate commerce act, we are both required and authorized to consider, we find that the value of the steam-railway property of the carriers subject to the act held for and used in the service of transportation is, for the purposes of this particular case, to be taken as approximating the following: 1607 1608

Eastern group, as defined by the carriers	$8,300,000,000
Southern group, as defined by the carriers	2,000,000,000
Western group, as defined by the carriers, including both the Western and Mountain-Pacific groups herein designated	8,100,000,000
Total	$18,900,000,000

1609

It is not deemed necessary, for the present purposes, to apportion the aggregate value of the properties in the western group, as defined by the carriers, so as to show the value of the properties in the western and Mountain-Pacific groups as we have here defined them. Many of the important railroads are in and serve both groups into which we have divided the carriers' western group. It is not thought advisable to delay the de- 1610

1611 *Defendants' Exhibit.*

cision of this matter to permit an accurate apportionment of the value of such properties, particularly as the result could not materially effect the determination we reach.

The record does not permit the estimation of the aggregate value of the properties of electric
1612 railways, other than those operated by steam roads, or of the boat lines, both of which have been made the subject of independent representations in this proceeding.

THE CONSTRUCTIVE YEAR.

In estimating their financial needs for the
1613 immediate future the carriers have based their figures on the actual performance for the 12-month period ended October 31, 1919, with certain adjustments to be subsequently described. This period was considered by the carriers more representative of normal conditions than the calendar year 1919 for the reason, among others, that the bituminous coal strike began on Novem-
1614 ber 1, 1919, ending early in December. Accounting committees were formed in the eastern, southern, and western groups, and in December, 1919, questionnaires were sent by those committees to the carriers in each group with a view to obtaining a "constructive" showing for the year ended October 31, 1919. Without discussing in
1615 too great detail the methods and bases employed in compiling the questionnaires it may be stated that an effort was made to devise a constructive year that would reflect increased prices of materials, wages, taxes and rates effective when the questionnaries were answered, to wit, January and

1616 February, 1920. This information was intended to show, as nearly as practicable, what increased revenues the carriers would require to enable them to earn 6 per cent on the book cost of their properties, on the basis of the tonnage actually moved during the year ended October 31, 1919, and on the basis of the prices, wages, taxes, and 1617 rates effective when the questionnaires were answered. Still further adjustments of the figures were subsequently made to make provision for increases in prices, additional railway-mail pay, and other items that became effective after the answers to the questionnaires were received.

The difficulty of making an accurate statistical analysis of the results of railway operation dur- 1618 ing the constructive year devised by the carriers is due in part to the incompleteness of their own figures. The questionnaire to which reference has already been made requested the individual railroads to follow the general instructions therein set forth. A number of small carriers failed to answer the questionnaire, and we are 1619 asked to assume that the directions — which were none too specific — were accurately and faithfully followed by the other carriers. The evidence indicates that such an assumption is unwarranted. An exhibit filed by the southern carriers shows that in adjusting freight revenue for the constructive year only six of them showed a 1620 credit to freight revenue; some of them made no adjustment whatever of freight revenue; and still others showed a debit. There is no adequate explanation of record of such widely divergent results, but they strongly indicate that the method followed by the various carriers in responding to

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the questionnaire was not uniform. To the extent that different methods were employed the results are subject to criticism. A specific request by us that the carriers furnish "all underlying details and formulas upon which the constructive
1622 increases estimated for 1920 were based for the three groups" met with a response so general in character that it does not serve the purpose intended. Numerous other criticisms of the carriers' figures for the construction year — some of which are justified by the facts — were made at the hearing. The inadequacy of the data furnished by the carriers increases substantially the
1623 difficulty of forecasting the results of operation for the two-year period.

Some of the important adjustments of revenues and expenses made subsequent to the filing of the questionnaire were based on data hastily obtained, in part by telegraph, from a few carriers regarded as typical. There is no assurance that
1624 this information was compiled on a uniform basis and no proof that it is accurate. The agents of the individual carriers by whom the information was originally compiled were not present at the hearing. Although an honest effort has apparently been made to provide the best information that could be obtained in the limited time avail-
1625 able, it is necessary to call attention to the fact that the details of a number of the adjustments, both in the original questionnaire and subsequent thereto, can not be accepted as accurate.

The proposals of the carriers as originally presented and as considered throughout the hearings made no allowance for increased wages of rail-

way employees not then effective. In the course of the hearings it was stated that a decision of the United States Railroad Labor Board would soon be forthcoming granting certain increases in the wages of railway employees, and it was generally agreed that we should give due consideration to the award of that board when made. On July 20, 1920, after the close of the hearings and oral argument, the Labor Board announced a decision awarding approximately $618,000,000 as increased wages. In discussing the results of operation in each group we shall deal first with the evidence as presented, without reference to the award of the Labor Board, and shall thereafter refer to the wage award and to its effect upon the operating expenses of the carriers in the several groups.

Revenue Needs of Carriers in Eastern Groups

The eastern carriers ask that they be permitted to earn an annual net railway operating income of $559,409,933, which represents 6 per cent on a book cost of $9,323,498,898.[1] That the rates of transportation now in effect fall far short of yielding the return sought by the eastern carriers is indicated by the following:

[1] This represents the book cost of 51 class I systems, 39 class II, 30 class III, and 24 switching and terminal companies. The figures include additions and betterments to October 31, 1919, the estimated costs of equipment allocated by the government to the carriers, and the book value of material and supplies as of October 31, 1919. It has been explained elsewhere that the book cost cannot be accepted, and is not accepted, as showing the fair value of the railroad property devoted to the service of transportation.

1631

Defendants' Exhibit.

Net Railway Operating Income.[2]

As sought by the carriers...	$559,409,933
Actual, year ended October 31, 1919	220,981,068
Year ended October 31, 1919,	
1632 adjusted	112,465,003
Year ended October 31, 1919, finally adjusted	18,008,219

The figure in the next to last line is that compiled from the questionnaires, as previously explained. The figure in the last line reflects the further adjustments that were made subsequent
1633 to the receipt of the questionnaires, as has also been explained.[3] It will be noted that the eastern carriers estimate that on the basis of the costs effective when the adjusted figures were compiled they will fall short by over $500,000,000 annually of earning the net railway operating income to which they claim they are entitled. As noted later
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[2] Includes 51 class I, 39 class II, 30 class III, and 24 switching and terminal companies; aggregate mileage, 71,218.37.

[3] The adjustment based on the questionnaire reflected changes in certain items as follows: Decrease in railway operating revenue, $3,777,449; increase in railway operating expenses, $56,802,208; increase in railway tax accruals, $7,165,502; increase in uncollectible railway revenues, $27,678; increase in equipment rents, $13,996,332, net; increase in joint facility rents, $82,976 net. There were also included additions of $7,162,449
1635 to corporate expenses and $17,693,800 to Federal income taxes. Miscellaneous items of increase aggregated $1,807,671. The adjustment made subsequent to the receipt of the questionnaires embraced the following: Estimated increased mail pay, $14,348,800; railway operating expenses, of which $34,094,687 represents increased wages and $54,811,580 increased fuel costs; railway tax accruals, $16,510,681; estimated increased allowance to private car owners, $3,888,636. In connection with the last item attention is called to the fact that there is no evidence showing that the carriers made allowances for increased earnings resulting from our decision in *Perishable Freight Investigation*, 56 I. C., 449.

herein, the carriers proposed to obtain all the additional revenue from freight traffic, and estimated that a general increase of 30 per cent in charges for freight transportation was needed. No detailed analysis of the carriers' adjusted figures will be attempted in this report. 1636

The following table compares the "standard return" of class I carriers in the eastern group with the figures shown in the last preceding table: 1637

Net Railway Operating Income, Eastern Group.

Standard return	[4] $354,711,079
Actual, year ended October 31, 1919	[5] 220,981,068
Year ended October 31, 1919, adjusted	[5] 112,465,003
Year ended October 31, 1919, finally adjusted	[5] 18,008,219

1638

Not only has there been a sharp decline in railway operating income during the last three or four years, but the operating ratio has increased at a rate that causes serious concern. For the period of five years, beginning with 1912 and ending with 1916, the eastern carriers were spending out of every dollar of operating revenue received approximately 71 cents for operating expenses. This increased to 75.03 cents in 1917, to 85.82 cents in 1918, to 88.51 cents in 1919, and to 97.68[6] in the first four months of 1920. When it is con- 1639 1640

[4] Represents the average net railway operating income of class I railroads, excluding switching and terminal companies, for the years 1915, 1916, and 1917.

[5] For 51 class I railroads, 39 class II, 30 class III, and 24 switching and terminal companies; aggregate mileage, 71,218.37.

[6] Not including Illinois Central north of Cairo.

1641 sidered that operating expenses do not include railway tax accruals, uncollectible railway revenues, joint facility rents, hire of equipment, rents for lease of road, interest on funded and unfunded debt, and other fixed charges, dividends, and certain other items, the above figures are significant. The operating ratio for the first four months of
1642 1920 means that during that period, after payment of operating expenses, there was left 2.32 cents out of each dollar for the payment of taxes and the other items just mentioned. During the period of six years, beginning with 1912 and ending with 1917, it took approximately 28.79 cents
1643 out of every dollar of operating revenue to pay the items mentioned which are not included in operating expenses and which are not considered in determining the operating ratio.

If the basis of the carriers' calculations be accepted as proper, an analysis of the results of operation for carriers in the eastern group during the first four months of the calendar year
1644 1920 indicates that the eastern carriers were conservative in estimating their revenue needs. It will be recalled that these carriers, after finally "adjusting" the figures for the constructive year, arrived at a net railway operating income of $18,008,219. The actual results of operation for the first four months of the current calendar year
1645 show a net railway operating deficit of $870,210.* Because of unusual conditions that obtained in

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* Includes estimate for Illinois Central north of Cairo, Ill., taken from carriers' figures, also data for Chesapeake & Ohio, Norfolk & Western, Virginian, Richmond, Fredericksburg & Potomac, and Washington Southern.

the eastern group during the early part of the year it is unsafe to assume that the results for the first four months fairly indicate what the results will be for the year, and the figures are referred to merely to show that during this period the situation was even more unfavorable than the carriers predicted. 1646

The number of ton-miles of revenue freight for class I carriers in the eastern group during the last eight years is shown below: 1647

Year.	Revenue, ton-miles.
1912	[7] 149,609,767,908
1913	[7] 170,097,999,591
1914	[7] 161,263,328,467
1915	[7] 154,398,802,727
1916 (June 30)	[7] 193,530,008,573
1916 (December 31)	[8] 202,421,305,944
1917	[8] 212,660,648,483
1918	[8] 216,032,596,432
1919	[8] 190,744,545,350

1648

It will be noted that the tonnage for the year 1919, the first 10 months of which were included in the carriers' constructive year, is the lowest since 1915. 1649

It is estimated that the wage award made by the Labor Board under date of July 20, 1920, will add approximately $314,562,000 annually to the operating expenses of the carriers in the eastern group.[9] This is equivalent to 12.2 per cent of the total railway operating revenue of the eastern 1650

[7] Compiled by the Commission's Bureau of Statistics.

[8] From carriers' exhibits.

[9] The carriers estimate that the wage award will add approximately $625,000,000 annually to the operating revenues of all carriers. A statement received from the Labor Board states the figure as approximately $618,000,000. For the purposes of this report we have used the latter figure.

1651 *Defendants' Exhibit.*

carriers, as finally adjusted by them for the constructive year.

REVENUE NEEDS OF CARRIERS IN SOUTHERN GROUP

The financial condition of the carriers in the southern group as a whole is more favorable than that of the carriers in either of the other groups.
1652 The southern carriers ask that their rates be increased sufficiently so that they may earn a net railway operating income of $136,049,091, which represents a return of 6 per cent on a book cost of $2,267,484,847.[8] The extent to which present rates fall short of yielding the return sought by these carriers is shown by the following:

1653

Net railway operating income as sought by the carriers	[10] $136,049,091 *
Standard return	[11] 138,231,029 *
Net railway operating income actual, year ended October 31, 1919	[10] 51,208,428 *
1654 Adjusted net railway operating income, year ended October 31, 1919	[10] 36,743,074 *
Finally adjusted net railway operating income, year ended October 31, 1919	[10] 16,269,429 *

* This represents the property investment account of 31 class I roads or systems, 34 class II, 49 class III, and 28 switching and terminal companies. The figures include additions and betterments to October 31, 1919, the estimated cost of equip-
1655 ment allocated by the Government to the carriers and the book value of material and supplies as of October 31, 1919. It has been explained elsewhere that the book cost is not accepted as indicating the fair value of the railroad property devoted to the service of transportation.

* See page 232.

[8] From carriers' exhibits.

[10] Includes 31 class I roads or systems, 34 class II, 49 class III, and 28 switching and terminal companies; aggregate mileage, 38,901.15.

[11] Represents the average net railway operating income of class I railroads, excluding switching and terminal companies for the years 1915, 1916, and 1917.

The amount $36,743,074 represents the actual income as adjusted in conformity with the questionnaire. The figure $16,269,429 reflects further adjustments made subsequent to the questionnaire.[12]

It will be noted that on basis of the predictions of the carriers the net railway operating income 1657
for this district will be approximately $120,000,000 lower annually than the sum which the carriers contend they should receive under the law. They estimated that a general increase of approximately 31 per cent in freight revenue would be necessary to return the amount claimed.

During the six years ended 1917 the railway 1658
operating income of these carriers averaged $126,000,000 annually; during the four years ended 1915 it averaged $108,000,000 annually; during 1916 and 1917 it averaged $163,000,000 annually; in 1918 it was $147,711,910, which was greater than in any previous year except 1916 and 1917. In 1919, however, it declined to $75,546,591.
During the six years ended 1917 the operating 1659
ratio of these carriers varied from 65.04 in 1916

[12] The adjustment based on the questionnaire reflected changes in certain items as follows: Increase in railway operating revenues, $461,085; increase in railway operating expenses, $13,957,972; increase in railway tax accruals, $807,383; decrease in uncollectible railway revenue, $628; increase in joint facility rents, $161,712. The adjustment made subsequent to the preparation of the questionnaire changes embraced the following: Estimated increased mail pay, $3,671,941; railway operating expenses, $7,134,359, representing increased wages, and $7,820,000 1660
representing increased fuel cost; railway tax accruals, $4,000,000, based upon increased income taxes incident to greater income if rate increase is granted; estimated increased allowances to private-car owners, $943,920 (as corrected); and corporate expenses — net, $4,045,834. In connection with the last item attention is directed to the fact that there is no evidence showing that the carriers made allowances for increased earnings resulting from our decision in *Perishable Freight Investigation*, 56 I. C. C., 449.

Defendants' Exhibit.

to 74.1 in 1914. In 1918 it was 77.66 and in 1919
1661 it rose to 86.08, and for the first four months of 1920 it was 86.22.[13] During the six years ended 1917, 27.05 cents out of every dollar of revenue earned by the carriers of this district was required to pay railway tax accruals, uncollectible railway revenues, rents for use of joint facilities, equipment, and leased roads, interest on funded
1662 and unfunded debt, dividends, and other miscellaneous income deductions.

The reports of class I carriers of this district to us for the first four months of 1920 show a net railway operating income of $23,399,151. Deducting the railway mail pay applicable to prior years stated by the carriers to have been taken into
1663 account in those months, in amount $8,287,241, leaves $15,111,910 as the actual result of operations. This figure should be compared with the estimate of $16,269,429 made by these carriers on the basis of a whole year's operations. The southern carriers substantially overestimated their needs, even assuming that the basis of their cal-
1664 culations is correct. As $15,111,910 covers only class I roads, $80,519 may be added for the remaining carriers, which produces an aggregate of $15,192,429.

During the period 1914 to 1919, inclusive, the net railway operating income of the first four months in each year averaged 32.15 per cent of the aggregate for the year. Equating the actual
1665 results of the first four months of 1920 on this basis produces an estimated net railway operating income of $47,254,834. Subtracting from this figure the carriers' estimate of $943,920 for increased allowances to private car owners, and

[13] Illinois Central north of Cairo not included.

$7,820,000, their estimate of increased fuel costs, reduces it to $38,490,914. Comparing this result with $136,049,091, which the carriers urge they are entitled to receive under the law, indicates a deficiency of $97,558,177 in net railway operating income.

The amount of freight and other transportation revenue, excluding passenger, mail, and express, reported to us for the first four months of 1920 by class I carriers aggregated $152,443,828. To this amount $8,226,302 has been added to cover revenues of carriers other than class I carriers, resulting in a gross estimated revenue of $160,670,130. During the years 1915 to 1919, inclusive, freight and other transportation revenue, excluding passenger, mail, and express, for the first four months of each year averaged 31 per cent of the aggregate for the year. Equating the actual revenues of the first four months of 1920 upon this basis produces estimated revenues for an assumed period of twelve months of $518,290,742.

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The number of ton-miles of revenue freight for class I carriers in the southern group during the past eight years is indicated in the subjoined statement:

Year.	Revenue ton-miles.
1912	[14] 27,483,661,188
1913	[14] 30,637,552,864
1914	[14] 31,376,537,497
1915	[14] 28,568,632,209
1916 (June 30)	[14] 34,183,991,890
1916 (December 31)	[15] 36,501,823,723
1917	[15] 42,825,200,670
1918	[15] 46,301,543,975
1919	[15] 41,527,854,002

1670

[14] Compiled by the Commission's Bureau of Statistics.
[15] From carriers' exhibits.

1671 It is estimated that the wage award made by the Labor Board under date of July 20, 1920, will add approximately $68,598,000 annually to the operating expenses of the carriers in the southern group. This is equivalent to 11.8 per cent of the total railway operating revenue of the southern
1672 carriers as finally adjusted by them for the constructive year.

REVENUE NEEDS OF CARRIERS IN WESTERN GROUP.

The western carriers ask that their rates be fixed on a basis that will permit them to earn a net railway operating income of $537,833,024. which represents a return of 6 per cent on a book
1673 cost of $8,963,883,753.[16] The extent to which the rates of transportation now in effect fall short of yielding the return sought by these carriers is indicated by the following comparison:

Net railway operating income as sought by the carriers...		[17] $537,883,024
Standard return		[18] 401,215,984
1674 Actual net railway operating income year ended October 31, 1919	$293,212,870	
Less corporate income charges—net debit	28,027,616	
		[17] 265,185,254
1675 Adjusted net railway operating income year ended October 31, 1919		[17] 226,831,658
Finally adjusted net railway operating income year ended October 31, 1919.....		[17] 184,939,759

[16] This represents the book cost of 59 class I systems, 53 class II, 41 class III, and 32 switching and terminal companies. The figures include additions and betterments to October 31, 1919,

1676

The figure $226,831,658 represents the actual income, as adjusted in conformity with the questionnaire. The figure $184,939,759 reflects adjustments subsequent to the questionnaire.[19]

It will be observed that on the basis of the predictions of the carriers, the net railway operating income for this district will be approximately 1677
$350,000,000 lower than the annual sum to which they claim to be entitled. They estimated that a general increase of approximately 24 per cent in freight revenue was required to return the amount claimed.

During the six years ended 1917 the railway operating income of the carriers averaged $386,- 1678
000,000 annually; during the four years ended 1915 it averaged $347,000,000 annually; during the years 1916 and 1917 it averaged $464,000,000 annually; in 1918 it dropped to $330,320,330; and in 1919 it declined further to $302,857,219. During the six years ended 1917 the operating ratio

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the estimated cost of equipment allocated by the government to 1679
the carriers and the book cost of material and supplies as of October 31, 1919.

[17] Includes 59 class I systems, 53 class II, 41 class III, and 32 switching and terminal companies; aggregate mileage, 138,243.74.

[18] Represents the average net railway operating income of class I railroads, excluding switching and terminal companies, for the years 1915, 1916, and 1917.

[19] The adjustment based on the questionnaire reflected changes in certain items, as follows: Increase in railway operating revenues, $678,907; increase in railway operating expenses, $35,689,- 425; increase in railway tax accruals, $7,733,128; decrease in equipment rents, $4,523,553, net; decrease in joint facility rents, 1680
$304,163, net; increase in corporate items, $437,666, net.

The adjustment made subsequent to the preparation of the questionnaire changes embraced the following: Estimated increased mail pay, $13,513,600; railway operating expenses, $21,- 092,697 representing increased wages and $21,254,298 representing increased fuel costs; railway tax accruals, $11,242,557, based upon increased income taxes incident to greater income if rate increase is granted; estimated increased allowance to private-car owners, $1,815,947.

1681 *Defendants' Exhibit.*

ranged from 62.69 to 67.68; in 1918 it rose to 78.14, in 1919, to 80.96, and for the first four months of 1920 to 86.06.

The reports of the class I carriers of this district to us for the first four months of 1920 show a net railway operating income of $56,104,721.
1682 Deducting the railway-mail pay applicable to prior years, stated by the carriers to have been taken into account in these months, in amount $27,790,388, leaves $28,314,333 as the actual result of operations. Adding to this figure $1,209,969 to cover net railway operating income of carriers other than class I, produces $29,524,302.

1683 During the period 1914 to 1919 the net railway operating income of the first four months in each year averaged 23.29 per cent of the aggregate for the year. Equating the actual results of the first four months of 1920 on this basis produces an estimated net railway operating income of $126,-768,149, the net railway operating income of an
1684 assumed period of twelve months, on the basis of operating costs which prevailed during the first four months of 1920. Subtracting from this figure $3,789,728, which is the estimate of the carriers for increased allowances to private car owners, and $21,254,298, their estimate of increased fuel costs for the year, reduces it to $101,724,123.

The amount of freight and other transporta-
1685 tion revenue, excluding passenger, mail, and express reported to us by class I carriers for the first four months of 1920, aggregated $498,-001,006. To this amount $16,462,794 has been added to cover revenues of carriers other than class I carriers, resulting in a gross estimated

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revenue of $514,463,800. During the years 1915 to 1919, inclusive, freight and other transportation revenue, excluding passenger, mail, and express for the first four months of each year, averaged 28.52 per cent of the aggregate for the year. Equating the actual revenues of the first four months of 1920 upon this basis produces $1,803,870,266, as the estimated revenues of an assumed period of twelve months based on the operations of the first four months of 1920.

The number of ton-miles of revenue freight for class I carriers in the western group during the past eight years is indicated below:

Year	Revenue ton-miles.
1912	[21] 82,888,199,102
1913	[21] 96,986,976,238
1914	[21] 92,284,883,754
1915	[21] 90,945,571,633
1916 (June 30)	[21] 112,156,323,212
1916 (December 31)	[22] 123,250,722,123
1917	[22] 138,044,743,597
1918	[22] 142,335,128,414
1919	[22] 130,606,713,832

The carriers estimate that the wage award made by the Labor Board under date of July 20, 1920, will add approximately $234,840,000 annually to the operating expenses of the carriers in the western group. This is equivalent to 11.2 per cent of the total railway operating revenue of the western carriers, as finally adjusted by them for the constructive year.

[21] Compiled by the Commission's Bureau of Statistics.
[22] From carriers' exhibits.

1691 *Defendants' Exhibit.*

Extent and Method of Obtaining Needed Additional Revenue

As above noted, in the original applications the carriers proposed to obtain the desired additional revenue by general percentage increases in the respective groups, applicable to freight traffic only.
1692 No increases were suggested upon passenger, express, or mail traffic. In their amended proposals, following the wage award of the Labor Board, they propose to make increases upon all classes of traffic.

Passenger Traffic

During the last nine years there has been a sub-
1693 stantial increase in the number of revenue passenger miles, as is indicated by the following figures, compiled by our bureau of statistics:

Number of revenue passenger miles for each year, 1911 to 1919, Class I roads.

1694

Year ended June 30	Eastern [1]	Southern [1]	Western [1]	United States
1911	15,161,685,623	4,072,229,173	13,137,530,997	32,371,444,793
1912	15,401,753,902	4,221,415,582	12,693,093,065	32,316,262,549
1913	16,087,159,298	4,384,239,446	13,403,687,214	33,875,085,958
1914	16,348,655,263	4,585,239,471	13,633,090,680	34,566,985,414
1915	14,960,949,033	3,988,171,076	12,840,808,078	31,789,928,187
1916	15,628,070,433	4,115,750,883	13,902,077,834	33,645,908,150
1916 [2]	16,627,329,935	4,573,888,153	13,384,733,938	34,585,952,026
1917 [2]	18,408,279,975	5,776,735,965	15,291,842,609	39,476,858,549
1918 [2]	19,516,672,752	7,404,952,632	15,754,953,815	42,676,579,199
1919 [3]				[3] 46,145,070,641

1695

It will be noted that the increase for the country as a whole from 1911 to 1919 was over 40 per cent.

[1] The districts are those heretofore used for statistical purposes.

[2] As reported by the Director General of Railroads for carriers under federal control.

[3] Calendar year.

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Passenger fares were increased to a minimum rate of 3 cents per mile on June 10, 1918, resulting in an increase of 50 per cent where 2 cents per mile was the basic fare, 20 per cent where 2½ cents applied, and no increase where the fare was 3 cents or higher. It appears that rates per passenger mile have increased since 1916, as follows: In the eastern group, 27 per cent; in the southern group, 27½ per cent; and in the western group, 22½ per cent. The relatively small increase in the western group is due to the fact that a 3-cent basis prevailed more generally in that territory than in other parts of the country.

In part because of conditions growing out of the war the passenger traffic has become relatively more profitable during the last three years. A reduction in the number of passenger trains occurred simultaneously with a substantial increase in the number of passengers carried, resulting in heavier loading of passenger cars and trains. In 1919 the number of passenger miles was 30 per cent greater than in 1916, but the number of passenger-train miles was 12 per cent less. Thus, in spite of the curtailment in service, the passenger revenue for the railroads as a whole was greater by $470,362,485 in 1919 than in 1916. This increase in revenue is regarded by the carriers as net, "almost more than net, because it was actually moved in fewer trains."

Following request of counsel for certain shippers, the carriers provided for the record an analysis of the freight and passenger earnings and expenses for certain designated railway companies for the calendar year 1919. In making this

1701 *Defendants' Exhibit.*

analysis, the expenses that could not be allocated solely to freight or passenger traffic were apportioned generally in accordance with instructions issued by us on January 1, 1920. A recapitulation of the figures showing the ratio of freight and passenger service expenses to freight and
1702 passenger revenues is as follows:

Railroad	Operating ratio, freight service	Operating ratio, passenger service
Atchison, Topeka & Santa Fe	74.53	67.84
Atlantic Coast Line	89.54	80.21
Baltimore & Ohio	97.88	75.96
Chicago & North Western	90.41	75.93
Chicago, Burlington & Quincy	85.8	67.98
1703 Erie System	95.74	89.72
Great Northern System	80.70	84.08
Louisville & Nashville	95.3	76.9
New York Central	91.45	60.22
Cleveland, Cincinnati, Chicago & St. Louis	83.45	63.84
Pennsylvania Railroad, East	98.16	99.16
Michigan Central Railroad	81.20	58.50
Southern Railway	98.50	78.40

It will be noted that in the great majority of
1704 instances, the operating ratio was decidedly more favorable for the passenger traffic than for the freight traffic. However, there appears to be a wide discrepancy between the figures presented for the various lines, and too much reliance should not be placed upon this showing. Resumption of more frequent train service will tend to increase the operating ratio for passenger traffic. That the
1705 carriers contend that it is uncertain whether an increase in the general level of passenger fares will yield increased revenue proportionate to the increase in the fare level, because of possible reduction in travel following a material increase in fare.

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The foregoing would seem to indicate that such increase as is approved upon passenger traffic may properly be less than the percentage increase applied to freight traffic.

There has also been suggested the desirability of obtaining additional revenue for the rail carriers from an extra charge placed upon passengers in sleeping and parlor cars. Such a charge amounting to one-half cent per mile was in effect for a brief period during federal control. A charge of this character has much in its favor. Unquestionably the service is more valuable to the passengers, and more expensive to the rail carriers.

The Pullman Company opposes the re-establishment of a surcharge for Pullman occupancy on the ground that such a charge reduces the travel in cars of that type. It submitted a statement showing the revenues by weeks for the period March 1 to September 30, 1918, compared with corresponding weeks of the previous year. The surcharge imposed by the Director General was in effect from June 10 to November 30, 1918. The statement submitted by the Pullman Company shows that beginning with the third week of June there was a reduction in the revenue as compared with the same weeks of the previous year, whereas, during the period from March 1 to June 15, the earnings in 1918 were greater than in 1917. These figures appear in part at least to sustain the contention that the surcharge operated to reduce revenues.

An analysis of the situation, however, indicates that factors other than the surcharge were in part

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1711 responsible for the decreased revenue from passengers in sleeping and parlor cars in 1918, as the very large reduction in service rendered during that year undoubtedly accounts for a portion of the reduction in revenue. It is well known that the policy of the Railroad Administration at that time was to discourage luxury travel and reduce
1712 the mileage of sleeping and parlor cars, particularly the latter.

Figures quoted above in this report indicate that the total number of passenger miles in 1918, notwithstanding that the surcharge was in effect for half the year, increased 8 per cent over the previous year and were greater than in any year
1713 prior thereto, which indicates that travel on the whole was not materially affected by the surcharge.

In the amended application of the carriers following the wage award, it is proposed that a surcharge on passengers in sleeping and parlor cars be established amounting to 50 per cent of the
1714 charge for space occupied in either class of equipment. The carriers estimate that a charge of this amount will produce in their three groups respectively approximately the following amounts of revenue:

	Eastern group	$17,556,108
	Southern group	5,582,036
1715	Western group	20,231,200
	Total	$43,639,344

We conclude that increases as indicated next below may be made by all steam railroads subject

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to our jurisdiction serving the territory embraced in the groups hereinbefore designated.

1. All passenger fares and charges may be increased 20 per cent. The term "passenger fares" may be considered to include standard local or interline fares; excursion, convention, and other fares for special occasions; commutation and other multiple forms of tickets; extra fares on limited trains; club car charges. 1717

2. Excess baggage rates may be increased 20 per cent, provided that where stated as a percentage of or dependent upon passenger fares the increase in the latter will automatically effect the increase in the excess-baggage charges.

3. A surcharge upon passengers in sleeping and parlor cars may be made amounting to 50 per cent of the charge for space in such cars, such charge to be collected in connection with the charge for space, and to accrue to the rail carriers. 1718

4. Milk and cream are usually carried in passenger trains, and the revenue therefrom is not included in freight revenue. Rates on these commodities may be increased 20 per cent. 1719

SWITCHING AND SPECIAL SERVICES

The carriers' original petitions asked for percentage increases in freight revenue only. In their reports to us, revenue from switching and certain other special services is stated separately from freight revenue, and therefore, accepted literally, the proposal would result in no increases on switching service. However, it is conceded that the submission of the proposal in this form was due to a misunderstanding, and it is now pro- 1720

1721 *Defendants' Exhibit.*

posed to apply increases to switching and other special services as well as to freight rates proper.

No substantial reasons have been developed for exempting charges for switching from the general increases. It is our opinion that the charges for this service should be increased, together with
1722 the charges for transit, weighing, diversion, reconsignment, lighterage, floatage, storage (not including track storage), and transfer, where the carriers provide separate charges against shippers for such services. The charges for other special services are not to be subject to the general increases herein authorized. The percentage to apply should be determined by the percentage
1723 applicable in the group where the service is performed, except that at points on the boundary line between two groups taking different percentages the higher percentage should apply.

It should be understood that where tariffs now provide for the absorption by one carrier of the charges of another carrier in specific amounts
1724 such absorptions should be revised in harmony with the increases in charges herein authorized.

Freight Rate Increases

In their original applications the carriers proposed general percentage increases in freight rates in the respective groups as follows: eastern,
1725 30 per cent; southern, 31 per cent; western, 24 per cent.

Following such general percentage increases, they indicate their willingness, where necessary, to revise rates to restore in so far as is deemed practicable existing recognized relationships and

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differentials, and as to coal and grain in certain important situations such readjustments are proposed in this proceeding. It is stated that the percentage method is not only on the whole the fairest to all interests by distributing the burden in proportion to the haul, but that it is the only way in which the desired increased revenue may 1727
be obtained without complications and delays due to tariff difficulties and to the lack of accurate statistics from which to determine the amount of revenue which may reasonably be expected from flat or maximum increases on particular commodities.

It would be desirable, if it were possible, to determine definitely the commodities, the sections of 1728
the country, and even the individual rates which can best bear the burden of increases, and the relationships of the rates and differentials which will be disturbed by a percentage increase. This is precluded by the necessity of prompt action upon the main issues presented.

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PERCENTAGE INCREASES VERSUS FLAT INCREASES AND MAINTENANCE OF DIFFERENTIALS AND RELATIONSHIPS

Many shippers have directed their testimony and argument principally to the method of increasing the rates rather than to the amount of the increases. Shippers are far from unanimous 1730
in their views and may be divided into three groups: (a) those who seek the preservation of existing relationships and differentials either by specific or flat increases or by applying the percentage increase to base rates and employing in

1731 *Defendants' Exhibit.*

connection therewith differentials from and to other points; (b) those who advocate a percentage advance in all instances, contending that differentials should increase in the same ratio as all other rates and charges; and (c) those who advocate a percentage increase with a maximum.

1732 While established or "differential" relationships of rates are not general, there are many such adjustments; some fixed by the carriers and others by us, and it is contended by some shippers that in such cases it is desirable in readjusting the rates to maintain the differentials.

Many relationships in cents per unit were disturbed by the increases made by the Director Gen-
1733 eral, except upon a few commodities of heavy movement which were subjected to specific increases in cents or dollars and cents per unit. A relatively small proportion of these relationships have subsequently been restored.

It is evident that there are many competitive situations where no recognized differentials have
1734 ever existed but where, nevertheless, the rates have been made to reflect competitive conditions. Such situations greatly outnumber those where "fixed relationships" have been established.

It is generally understood that on traffic to and from western trunk line territory and the southwest Chicago enjoyed for years a "differential"
1735 of 20 cents, first class, over St. Louis. This was thought to be a fixed, recognized, long-standing difference, and well entitled to bear the title "differential." Under General Order No. 28 it was increased to 25 cents. We are now asked on behalf of certain Chicago interests not to increase

this differential. In this connection it is interesting to note that on traffic to and from the east the St. Louis rates are made uniformly 117 per cent of the Chicago rates, so that under any general increase in rates the spread between the St. Louis rates and the Chicago rates is automatically widened. In 1914 the first-class rate from New York to St. Louis was 13 cents higher than to Chicago. The difference is now 19 cents, although the percentage relationship is the same now as it was in 1914. There is apparently no more justification for maintaining Chicago's differential over St. Louis on traffic to the west than for maintaining the differential of St. Louis over Chicago on traffic from the east. Practically all rates in official classification territory are constructed upon a percentage basis, and attention is directed to the important fact that not a single interest has here maintained, with the possible exception of Chicago, that we should depart generally from the percentage basis which has so long prevailed.

In favor of maintaining differentials, it is said that they have been fixed in most cases after careful investigation, and that they represent the proper measure of differences in the rates; that often they represent the maximum differences which will permit more distant shippers to compete with those in close proximity; that to increase rates by a percentage tends to decrease the radius in which goods are marketed, and thus by lessening competition prices are advanced; and that in all cases the margin of profit has not increased proportionately to prices.

Those who oppose maintaining differentials at this time contend that the value of the dollar ex-

1741 pressed in terms of commodities shipped to-day is in reality but one-half its former value, and, therefore, a differential which was fixed at a given amount several years ago should, to have the same economic effect, be greater to-day; that there have been general increases in the prices of practically all commodities, in wages and in the charges for
1742 nearly all services, and that differentials should not be made an exception to the rule; and that as increased operating costs are the underlying reason for the proposed increased rates, the additional service represented by the differential, being more expensive than heretofore, should pay greater rates as well as other services.

1743 The adoption of specific increases in cents per unit instead of percentage advances will, of course, maintain existing relationships. However, the carriers almost uniformly oppose this method and it is not generally advocated by shippers. Further, the difficulty of its adoption is apparent because of the lack of reliable statistics
1744 from which to determine the probable additional revenue from a given increase. It should also be noted that everyone who advocated this method insisted that flat increases be applied but once to combination rates. The complicated nature of tariff publication to make such an arrangement effective, when different percentages of increase
1745 are being made in different groups, is apparent.

Without attempting to pass finally upon the question whether in given cases differentials should or should not be maintained, it is evident that no general program of maintaining differentials can be made effective coincident with the increases here approved without materially delay-

ing their effective date as definite testimony 1746
covering individual situations is before us in only a very few cases. To maintain differentials by applying the percentage increases to basing rates and adding thereto existing differentials can not be done without materially lessening the amount of additional revenue to be derived by the carriers, as generally differentials are added to 1747
rather than deducted from base rates.

After carefully considering the situation we find that with the exceptions hereinafter noted general percentage increases made to fit the needs of the groups of lines serving each of the four groups must be considered for present purposes the most practicable. This conclusion is without prejudice 1748
to any subsequent finding in individual situations.

PROVISIONS FOR IMPROVEMENTS, BETTERMENTS, OR EQUIPMENT

Section 15a of the interstate commerce act contains the following proviso:

> *Provided*, That during the two years beginning March 1, 1920, the Commission shall take as such fair return a sum equal to 5½ per centum of such aggregate value, but may, in its discretion, add thereto a sum not exceeding one-half of one per centum of such aggregate value to make provision in whole or in part for improvements, betterments or equipment, which, according to the accounting system prescribed by the Commission, are chargeable to capital account.

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The increases here authorized are intended to yield the additional ½ of 1 per cent. The record

1751 *Defendants' Exhibit.*

leaves no doubt as to the needs of the country for additional transportation facilities. All carriers participating in the increases will be expected to make appropriate provision for additional improvements, betterments, or equipment of a character chargeable to capital account and to make
1752 report to us semi-annually, as of December 31 and June 30, showing what portion of the increased revenue resulting from the increases here authorized has been devoted to that purpose.

CONCLUSION AS TO GENERAL INCREASES

We are of opinion and find that the following
1753 percentage increases in the charges for freight service, including switching and special services,[26] together with the other increases hereinbefore approved, would under present conditions result in rates not unreasonable in the aggregate under section 1 of the act and would enable the carriers in the respective groups, under honest,
1754 efficient, and economical management and reasonable expenditures for maintenance of way, structures, and equipment, to earn an aggregate annual railway operating income equal, as nearly as may be, to a return of 5½ per cent upon the aggregate value, for the purposes of this proceeding, of the railway property of such carriers held for and used in the service of transportation and ½ of 1
1755 per cent in addition; eastern group, 40 per cent; southern group, 25 per cent; western group, 35 per cent; Mountain-Pacific group, 25 per cent.

[26] The increases should apply to special services in accordance with our findings under the caption "Switching and Special Services," *supra*.

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In view of the different percentages of increase herein approved, it becomes necessary to make provision for rates between the various groups.

(1) Where rates are constructed by the use of combinations upon gateways between any two groups, the through rates should be increased by 1757
applying to each factor its respective percentage.

(2) Rates between points within a group and points on the border line of such group should be increased according to the percentage applicable to the group. Where a river constitutes a boundary line between two groups, points on both banks thereof shall be considered as border-line 1758
points.

(3) Joint or single-line through rates between points in one group and points in other groups should be increased 33⅓ per cent.

(4) In cases where the rates over different routes between the same points would, by a strict application of the varying percentages of in- 1759
crease herein approved, be subject to different percentages, the lowest percentage applicable to any of the routes may be applied to the rates over all of such routes.

In the construction of rates in accordance with these findings it is not intended that the group boundaries hereinbefore designated should be strictly observed, but the territorial boundaries 1760
heretofore recognized should be observed. For example, Richmond, one of the so-called Virginia cities, should continue on the basis which it has heretofore enjoyed.

The above findings apply to all steam railroads subject to our jurisdiction, including so-called "short lines," but not to railroads in Alaska.

1761 *Defendants' Exhibit.*

While the New England carriers are included in the eastern group and are subject to the percentage for that group, the evidence as to the disproportionate needs of the New England lines makes it desirable that the carriers give careful consideration to the divisions of joint rates accru-
1762 ing to these lines.

INDIVIDUAL COMMODITIES.

Considerable evidence was presented with respect to the rates upon a number of individual commodities, including coal, lumber, cement, fruits and vegetables, petroleum, brick, sand,
1763 gravel and rock, asphalt, slag, grain, live stock, packing-house products, ore, bullion, potash, salt, fertilizers, and terra cotta.

Various issues have been raised or are presented as to these commodities, the principal of which are as follows: (a) Whether there should be departures from the general percentage in-
1764 creases by maintaining differentials or by the application of specific increases instead of percentages; (b) whether maximum increases should be provided in order to avoid the full percentage increase upon relatively high rates from distant points of production to imporant markets; (c) whether because of the high cost of production and marketing of some commodities, the percent-
1765 age increases proposed by carriers will result in a cost delivered at points of market or consumption so great as to curtail production and distribution, an undesirable situation at this time of world shortage of commodities; (d) whether a more general necessary use warrants a lower transportation charge; (e) whether the rates

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effective June 24, 1918, before General Order No. 28 became effective, should be made the basis of readjustment now by applying thereto a 25 per cent increase and superimposing thereon the percentage increases now found reasonable. Our general conclusions as to the impracticability of 1767
specific increases or of attempting now to maintain differentials dispose of a number of these contentions. It should also be said that while we do not here sanction specific increases in lieu of percentages, we are not to be understood as expressing disapproval of increases of that character made by the Director General. Such in- 1768
creases were made under war conditions and under circumstances that do not now exist.

Our attention was called at the hearing to a number of formal complaints now pending, and we are asked to except from the general increase the rates in issue in those complaints. This would have the effect, during the pendency of those pro- 1769
ceedings, of giving the rates in question a preferred standing and of exempting them from the general increase. In our opinion, a fairer disposition will be attained by applying the general increase to these rates, with the understanding that this action is without prejudice to any future findings.

Coal.—Carriers serving the Pennsylvania- 1770
Ohio-West Virginia coal fields propose to continue the existing differentials in coal rates, and have worked out a scheme of rates to effect that result. Carriers in the southern and western groups propose to ignore existing differentials in coal rates within those groups. The proposal of

1771 the eastern lines to preserve existing relationships is approved, and carriers in the other groups should work out a similar plan for restoring the relative adjustments of coal rates now obtaining in those groups. An effort should be made promptly to devise rates in each group that will
1772 yield, as nearly as practicable, the same revenue in the aggregate as would be afforded by a straight percentage increase on the basis herein approved.

Lumber.— Lumber moves in large volume, and it is under ordinary conditions a commodity of comparatively low value and highly competitive in nature. It is produced in almost all parts of
1773 the country. The greatest consuming region is in the middle west and the states east of the Mississippi river and north of the Ohio, including New England. Lumber from both the west and the south is marketed in large volume in this region, and the competition between the two pro-
1774 ducing sections is keen.

There is no definite or fixed relationship in the rates from the south and the west to the consuming territory described, but carriers from each of these sections have endeavored to maintain rates relatively so adjusted as to permit free movement from each. The volume of production in the west has grown materially in the past decade,
1775 until to-day it is such that if excluded from eastern markets it is claimed a considerable curtailment of production will result.

The Director General applied a maximum increase of 5 cents upon lumber, which had the effect of maintaining in most cases the existing spread in cents per 100 pounds between southern

and western lumber in the northern and eastern markets. The western lumber producers urge in this proceeding also the adoption of a maximum. 1776

Most of the southern producers, including those in the Carolinas and others who ship on comparatively short hauls to the northern markets, urge the application of a straight percentage increase. 1777

For the purposes of this report it is our opinion that the percentages hereinbefore approved should apply to this commodity.

Petroleum and its products.— The principal sources of the petroleum marketed in the United States are in the southwest, which will be termed the midcontinent field; in Wyoming, in California, and in Mexico. 1778

In the past ten years many refineries representing a considerable investment have been established in the midcontinent field and the refined oil there produced is marketed to a considerable extent in the middle west and in the states east of the Mississippi and north of the Ohio. 1779

In competition with the refineries of the midcontinent field in the northern and eastern markets are the refineries of Mexican petroleum located along the Atlantic coast and other refineries in the northern and easter States, which obtain their crude oil in large part from the midcontinent and other fields through pipe lines, though some of these refineries use rail transportation for the movement of their crude oil. 1780

The director general imposed on petroleum a flat increase of 4½ cents per 100 pounds in lieu of the standard 25 per cent. The midcontinent shippers claim that a percentage increase now ap-

1781 *Defendants' Exhibit.*

plied without modification to petroleum will in all probability tend to restrict the long-haul movement by rail. Other shippers contend that the percentage increase should be applied without exception.

It is concluded that no exception to the gen-
1782 eral percentage increases herein approved need at this time be made upon petroleum or its products. As has been observed in connection with other situations, the carriers should give careful consideration to the effect of the percentage increases approved on petroleum and, if necessity arises, should arrange for such modifications as the situation may seem to warrant.

1783 *Fruits and Vegetables.*— Fruits and vegetables are produced in large volume in the far western states and in the south, particularly in Florida. These products are shipped in season to practically all sections of the country, but the most important consuming territory lies east of the
1784 Mississippi river and north of the Ohio. Comparatively long hauls to the latter territory are involved both from the south and from the Pacific coast states, and it has been contended that the effect of the proposed percentage increases applied to these rates will produce charges so high as to restrict consumption because of the resultant high delivered cost.

1785 It has been shown that in some instances it has not been possible to market profitably some fruits and vegetables, but the facts before us in this proceeding do not warrant the conclusion that transportation charges are the controlling factor in producing this result, or that the percentage increases applied to the present rates will in fact

1786 have the effect feared by the fruit and vegetable shippers.

The western apple producers claim that in the past they have had difficulty in marketing in the east and that percentage increases will add materially to this difficulty. It appears, however, that the size, varying widely from year to year, 1787 of the eastern and western crops, respectively, is an important factor in determining the prices received by western growers and the ability to market in the east.

A number of the fruit and vegetable rates covering long hauls, upon which there is a heavy movement, are now before us in other proceedings, and our prior observations as to the effect 1788 of our present findings with respect to rates so pending upon complaint are applicable. It is concluded that no exceptions to the general percentage increases will now be made.

Sand, Gravel, Rock, and Slag.— The Director General increased rates on sand, gravel, and 1789 stone by specific amounts. Rates on slag in the east were increased 25 per cent and in the south generally by 1 per cent per 100 pounds, the same as applied to sand and gravel.

Shippers of all these commodities contend that the 1-cent increase made by the Director General averaged much more than 25 per cent and that to apply to the present rates the percentage in- 1790 creases proposed by the carriers will produce rates so high as to materially restrict movement. The eastern shippers of sand and gravel also contend that the different method under General Order 28 of increasing the rates on slag as compared with sand and gravel has resulted in prefer-

1791 ence of slag. The eastern carriers concede that rates on slag should not be less than upon sand and gravel.

We are not convinced that exceptions should be made at this time from the percentages approved for traffic generally. However, the record does
1792 suggest that rates in eastern territory are out of proportion to those in the other groups. The carriers have indicated a willingness promptly to readjust rates in cases where hardship results from the general percentage increases, and their special attention is called to these commodities to the end that such action may be taken as the facts may seem to warrant.

1793 *Live Stock and Packing-House Products.*— Shippers contend that the condition of the live-stock industry is such as to make it probable that the full percentage increase proposed by the carriers will discourage production and distribution. Live stock is produced throughout the country, but the consuming markets in the north and east
1794 are to a considerable extent dependent upon the stock produced in the west and southwest. Drought conditions have prevailed here and there in recent years and the present condition of the producers does not appear favorable. However, it is not clear that this condition results from transportation charges.

1795 The Director General in increasing rates on live stock applied a maximum of 7 cents per 100 pounds, while the full 25 per cent increase was applied to packing-house products. To apply again a maximum to live stock, as requested by shippers, without similar maximum upon packing-house products, will in all probability tend to

1796 lessen the movement of the southwestern and western stock to local packing plants and increase the movement to the larger and more distant plants in the middle west.

One of the principal difficulties of which complaint has been made by the live-stock producers is the lack of prompt and efficient service. To 1797 encourage the long-haul movement as against the short-haul movement under present conditions of car supply would tend to increase rather than reduce the transportation difficulties.

From Montana to Chicago the rate on cattle is 55 cents and on hogs 62 cents per 100 pounds. These are among the highest rates now in effect applicable to heavy movements. Under the gen- 1798 eral basis of increase herein approved, these rates would be advanced 18 cents and 21 cents, respectively, approximately one-fifth cent per pound.

It is concluded that the facts before us at this time do not warrant any exception to the percentage method of increasing the rates on either live 1799 stock or packing-house products.

Iron ore.—A considerable proportion of the iron ore consumed in the United States originates on ranges in Minnesota and Michigan near the head of Lake Superior. This ore moves to furnaces on Lake Michigan and Lake Superior; to furnaces on Lake Erie and in Pennsylvania, Ohio, 1800 and other states. The movement is by rail to the upper lake ports, and when destined beyond, by lake vessels to the lower lake ports.

Because of the keenly competitive situation between the respective furnaces, the Director General adopted a specific increase of 30 cents per

1801 *Defendants' Exhibit.*

ton upon iron ore in lieu of a percentage, which was applied to the movement from the Michigan and Minnesota ranges to the upper lake ports, but not from lower lake ports to eastern destinations, thus resulting in an equal increase in cents per ton for the rail transportation to each of the com-
1802 peting furnaces. Under this plan the rates of the western carriers up to the lake ports were increased approximately 57 per cent, whereas the rates of the eastern carriers from the lower lake ports were not increased.

In this proceeding the eastern carriers propose first to apply an increase of 22 cents per ton and then impose thereon the general percentage in-
1803 crease. The testimony of ore shippers is conflicting, some proposing no further increase from the ranges to the lake ports, some favoring double increase in the rates from the lower lake ports, others proposing no exceptions to the general percentage increases proposed on traffic generally.

1804 The returns made by the principal ore-carrying roads from the Minnesota ranges to Lake Superior ports indicate that such lines are in a much more prosperous condition than the western carriers generally.

It is concluded that at this time no increases should be made in the rates on iron ore from the
1805 Minnesota or Michigan ranges to Lake Superior or upper Lake Michigan ports. Other rates on iron ore may be increased according to the percentages herein approved.

Other Ores.— In some of the western states there is a considerable movement of low-grade ores, some of which are valued at $5 per ton or

less. Shippers of these low-grade ores contend 1806
that further increases in the rates thereon will result in curtailing or destroying their movement. The evidence before us in this proceeding, however, does not warrant exceptions to the general percentage increases at this time.

Grain and Grain Products.— On grain and 1807
grain products we are asked to apply in connection with such percentages as may be approved a maximum increase. For the same reasons that have led to the conclusion that neither specific nor maximum increases are desirable, we find that upon this record no exception should be made of the general percentages upon these commodities, except as noted.

1808

There are in the middle west a number of important grain markets through which it has been customary to maintain an equalization of the rates from important producing states to important consuming regions, under which the sum of the rates into and out of the various markets is in most cases equal. This adjustment differs 1809
from an ordinary differential basis in that it is in substance providing an equal through charge over various routes between the same points by the use of sums of proportional rates rather than the establishment of joint through rates or of transit. The application of different percentages in the various groups will result in dislocation of this equalization. 1810

Carriers and shippers unite in recommending that this equalization be continued because of the keenly competitive situation of the various markets and of the lines of railway serving such markets. However, sufficient detailed information

1811 to cover fully the situation is not before us upon this record. We find that the grain rates into and out of these markets may be increased by the general percentages herein approved, with the understanding that the carriers will, within thirty days after the service of this report, file tariffs
1812 restoring the equalization through the grain markets now enjoying that basis. This should be done after conference with interested shippers, and, if desired, we will lend our cooperation in the premises.

Port Differentials

1813 The eastern carriers express of record their willingness to preserve existing relationships between the rates to and from the eastern ports. No objection to this proposal was made. This result can be readily accomplished for the reason that all rates in official classification territory between the ports and points west of the Buffalo-Pittsburgh line are based on the New York-Chicago
1814 rates. The base rates may be increased and existing port differentials maintained. It is our view that in filing the increased rates here authorized a provision of this character should be made.

Applications of Boat Lines

1815 There have been filed in this proceeding applications for increased rates by a number of boat lines. The record shows that the expenses of the boat lines have increased in general at least in the same proportion as expenses of the railroads. Authority is therefore granted to boat lines subject to our jurisdiction to increase their rates to

1816 the same extent as increases are herein granted to railroads operating between the same points or in the same territory. In the construction of rail-and-lake rates the present parity between Chicago and Duluth should be maintained.

Freight Rates of Electric Lines

1817 Petitions have been filed in this proceeding by a national organization of electric lines, seeking permission to increase their rates in the same proportion as the rates of trunk lines are advanced. The operating costs of these lines have, on the whole, increased in approximately the same ratio as those of steam railroads. In some instances 1818 there is competition between the electric lines and the steam railroads. We conclude that the freight rates of electric lines may be increased by the same percentages as are approved herein for trunk lines in the same territory. This is not to be construed as an expression of disapproval of increases, made or proposed in the regular manner, in the passenger fares of electric lines. 1819

Minimum Carload Charge, Minimum Class Scale, and Minimum Charge Per Shipment

There is now in effect, with certain important exceptions, a minimum charge of $15 per car on carload traffic, applicable to line-haul movements. 1820 There are also minimum class rates in the three classification territories. We find on the record no explanation of the underlying basis of the minimum carload charge or the minimum class scales and no justification for increasing them. It is our understanding that these minima were imposed

1821 *Defendants' Exhibit.*

as a revenue measure in connection with rates substantially lower than those authorized in this report. We also find that the minimum charge per shipment for less-than-carload traffic should not be increased.

SPECIFIC DIVISIONS

1822 In many cases divisions between carriers are in the form of specific amounts per unit. It is obvious that unless divisions of this character be increased, such lines will receive no benefit from the increases herein approved, while the other carriers will receive more than the respective percentage increases applicable to the traffic. It is
1823 concluded that where carriers earn specific amounts as their compensation out of through rates or fares, such amounts should be increased in the same percentages as the through rates or fares. Where the divisions of carriers participating in through rates or fares are in fixed amounts per unit and are absorbed by other carriers, such
1824 absorptions should be increased in the same percentage as the through rates or fares.

JOINT RATES TO AND FROM FOREIGN COUNTRIES

Nothing herein should be construed as authorizing any increases in the proportions of joint through rates to or from points in foreign coun-
1825 tries accruing in such foreign countries. The proportions of such rates accruing within the United States may, however, be increased to the extent herein approved for domestic rates in the same territory.

Defendants' Exhibit. 1826

FOURTH SECTION DEPARTURES

In instances where the approval herein of different percentages of increase results in departures from the provisions of the fourth section of the act the carriers will be expected either to correct such departures by tariffs filed not later than November 1, 1920, or to file on or before that date 1827 applications seeking permission to continue such departures. Temporary fourth section relief will be granted by appropriate order.

DISPOSITION OF FRACTIONS

In computing and applying all increased rates authorized herein fractions will be treated as 1828 follows:

Where rates are stated in amounts per 100 pounds or any other unit, except as provided in the succeeding paragraph, fractions of less than ¼ of a cent will be omitted. Fractions of ¼ of a cent or greater but less than ¾ of a cent will be stated as ½ cent. Fractions of ¾ of a cent or 1829 greater will be increased to the next whole cent. This rule will also be followed in computing passenger fares.

Where rates are stated in dollars per carload, including articles moving on their own wheels, when not stated in amounts per 100 pounds or per ton, amounts of less than 25 cents will be 1830 dropped; thus, $25.24 will be stated as $25. Amounts of 25 cents or more but less than 75 cents will be stated as 50 cents; thus, $25.65 will be stated as $25.50. Amounts of 75 cents or more but less than $1 will be raised to the next dollar.

1831 *Defendants' Exhibit.*

OUTSTANDING ORDERS OF THE COMMISSION

An order will be entered modifying outstanding orders of the Commission to the extent necessary to permit the carriers to make effective the increases herein authorized.

1832 EFFECTIVE DATE OF NEW RATES AND SUBSEQUENT ADJUSTMENTS

In view of the existing situation it is important that the increased rates be made effective at as early a date as practicable. The increases herein approved may be made effective upon not less than five days' notice to the Commission and to
1833 the general public by filing and posting in the manner prescribed in the interstate commerce act. The authority herein granted will not apply to any rates, fares, or charges filed with this Commission to become effective later than January 1, 1921.

Most of the factors with which we are dealing
1834 are constantly changing. It is impossible to forecast with any degree of certainty what the volume of traffic will be. The general price level is changing from month to month and from day to day. It is impracticable at this time to adjust all of the rates on individual commodities. The rates to be established on the basis hereinbefore ap-
1835 proved must necessarily be subject to such readjustments as the facts may warrant. It is conceded by the carriers that readjustments will be necessary. It is expected that shippers will take these matters up in the first instance with the carriers, and the latter will be expected to deal promptly and effectively therewith, to the end

that necessary readjustments may be made in as many instances as practicable without appeal to us. 1836

An appropriate order will be entered.

EASTMAN, *Commissioner,* concurring:

I concur in the conclusions of the majority with respect to the increases in rates which should be permitted, but reach these conclusions by a somewhat different path. 1837

In the transportation act, 1920, Congress has attempted to lay down a rule by which we may be guided in determining the general level of railroad charges. Briefly, we are to adjust rates so that the carriers, as a whole, or as a whole in such rate groups or territories as we may designate, may earn an annual aggregate railway operating income equal as nearly as may be to 5½ or 6 per cent upon the aggregate value of the railway property held for and used in the service of transportation. 1838

In my opinion this rule can not now be applied. Under present conditions any forecast of traffic and expenses for the next twelve months is largely a leap in the dark. But the controlling fact is that any valid determination of "aggregate value" is now impracticable. 1839

For some time the Commission has been diligently engaged in the enormously difficult task of ascertaining and assembling the valuation data required by section 19a of the interstate commerce act; but it has not yet fixed final "value" for any road, and preliminary reports are available on but little more than 15 per cent of the mileage of the country. Nor have we as yet deter- 1840

1841 *Defendants' Exhibit.*

mined the principles by which " value " for rate-making purposes is to be estimated from the data accumulated. These principles are of vital consequence to the country. It is my conviction that the valuation doctrines which are prevalent in railroad and public utility circles and which have
1842 been urged upon us are fundamentally unsound in many respects and subversive of the public welfare. Discussion of this subject, however, must be reserved for another occasion. For the present it is enough to say that even if the controlling principles had been enunciated, upon the evidence now before us any present finding as to
1843 " aggregate value " is without adequate foundation. I know the good faith in which the majority have proceeded, but I feel sure that it is not in the public interest, and I can not believe it necessary under the law, that such an estimate should now be made. It will almost certainly be misunderstood and misinterpreted and may have an uncon-
1844 scious influence upon our valuation work for the future from which it ought to be free. As a side light upon the situation, it will, I think, be conceded that something more than estimates of this kind will be necessary when it comes to enforcing the closely related portion of the act which provides for a division with the government of any income which a carrier may earn in excess of
1845 6 per cent upon value.

I was one of those who opposed the early termination of federal control of railroads. The truth in regard to federal control was then obscured, in part by natural misunderstanding of circumstances arising out of war conditions

and in part by propaganda which was often deliberately mendacious. The fact is that both the central and the regional organizations of the United States Railroad Administration were made up of men of wide railroad experience, chosen without regard to political considerations, and that they carried on pioneer work for their country in trying times, for the most part with an ability, fidelity, and patriotism for which they merit only honor and praise. It was my hope that federal control might be continued, because it was evident that the transition back to private operation would create additional disturbance in a time of unsettlement and unrest, that existing railroad facilities could be made to do more work and meet more nearly the transportation needs of the country under unified control than under the control of many separate companies, that the additional facilities which are so greatly needed could now be provided more easily and more economically by public than by private capital, and that disturbances resulting from both rate increases and labor difficulties could be reduced to a minimum if the government retained direct responsibility for the roads.

1846 1847 1848 1849

It was also my hope and belief, if federal control were continued for a reasonable period, that it could gradually be developed, in the light of experience and by genuinely constructive measures, into a system of administration which would preserve the manifest advantages of unified operation and direct governmental responsibility for the transportation system, avoid the dangers which are presumed to inhere in governmental

1850

1851 *Defendants' Exhibit.*

operation by providing a management remote from political influences and free from undue centralization, and enlist the cooperation of labor by recognizing its just claim to some voice in the management.

The situation, however, received the careful
1852 consideration of Congress, and after long deliberation other conclusions were reached which were embodied in the transportation act, 1920. It is our plain duty to do everything possible to make the plan of operation adopted by Congress a success. Viewing the matter in this light, I am impelled to the conclusion that under existing
1853 conditions liberality in estimating the revenue needs of the carriers is desirable. Poor service is crippling our industries, curtailing production, and raising prices. As between high rates and poor service, the former is the lesser evil. While high rates will not at once bring good service, they may help to achieve this result. To provide
1854 good service the railroads greatly need additions and improvements and must secure large sums of capital for that purpose. They can only obtain such funds by the sale of their securities, and no private corporation is financially sound or can long continue to borrow unless it is able to market new stock. The war has depleted the resources of the world and produced profound disturbances
1855 in the money markets. Capital can only be obtained by the railroads in competition with demands from innumerable sources and at rates which would normally be regarded as exhorbitant.

Summing the matter up, conditions are critical and they have not been made less so by the tran-

1856

Defendants' Exhibit.

sition from federal to private control. The evil of poor service we have with us, and it is certain that the health of the nation will suffer seriously unless this evil is cured. It is my best judgment that the railroads can not function successfully without materially increased rates, and I am also persuaded that it is in the best interest of the 1857
country that the present plan of operation should receive without delay the best test that can be given it. Under all the circumstances, it follows that it would be a mistake if the railroads were now accorded rates designed to produce substantially less revenue than their responsible executives with unanimity assert that they need 1858
in order that good service may be provided. What revenue will actually be produced no one can tell. If the rates prove unduly high, they may later be reduced. The present proceeding has nothing of finality about it and in many respects is similar to a suspension case, where the question is whether or not certain proposed rates shall be permitted 1859
to take effect without suspension, a matter left by the act to the discretion of the Commission. I, therefore, concur in the increases of rates which the majority have approved.

I am authorized to say that Commissioner Woolley joins in this expression of opinion.

1860

McCHORD, *Commissioner:*

The concurring report of Commissioners Woolley and Eastman injects into this case large political questions of governmental policy which are nowhere in issue here. The Congress has, for the time being, settled the question of Government operation of the railroads by restoring them to

private operation, hedged around by comprehensive laws vesting broad powers in this Commission to regulate them. It is the duty of this Commission to enforce the law as Congress has written it. The questions involved in this case are so great and so vital to the American people that no such suggestions as are here made should be injected to further complicate the extremely delicate and vital situations that now confront this Commission, the public, and the railroads.

For more than thirty years this Commission has stood four square to every wind that blows, confining its activities within the four corners of the law, and it is unwise in this critical period to complicate the real questions involved with extraneous issues. This is neither the time nor the place. The Congress is the forum, and should Congress fail to meet the views of a dissatisfied public, if indeed it is dissatisfied, then the final remedy is to be found in that still greater forum, as was so well pointed out by the Supreme Court in *Taylor* v. *Beckham*, 178 U. S., 548, 580:

> The august tribunal of the people, which is continually sitting, and over whose judgments on the conduct of public functionaries the courts exercise no control.

and further:

> This tribunal, therefore, should be the last to overstep the boundaries which limit its own jurisdiction. And while it should always be ready to meet any question confided to it by the Constitution, it is equally its duty not to pass beyond its appropriate sphere of action, and to take care not to involve itself in discussions which properly belong to other forums.

Defendants' Exhibit.

The Commission has attempted to deal with this 1866
case under the law in a broad, comprehensive, common-sense way, realizing that the primary responsibility for the future of our railroads rested upon its shoulders and that of the state railroad commissions who have throughout the case and are still cooperating in a most helpful way. They will, in my opinion, measure up to 1867
this responsibility to make fully effective what the Interstate Commerce Commission has, with their cooperation, done in this case. After this the gravest responsibility rests with the employers and employees, for, after all, neither the Interstate Commerce Commission nor the state commissions can alone insure efficient railway service. 1868

The money derived from increased rates in and of itself will not solve the transportation problem. To enable the carriers to meet the present situation every man and group of men, whether employers or employees, must realize that they are in fact performing a public service. The spirit of duty and service must actuate all. 1869

Had the decision in this case been left to my individual judgment, I would have arrived at the same general conclusion, but perhaps by a somewhat different route. However, I, in common with others, subordinate my individual views to the views of the majority as to the method to be adopted to raise the increased revenue regarding 1870
which there is no difference of opinion.

With respect to the criticism of aggregate value —I do not share the apprehension that what is said and done by the majority will result in misunderstanding, misinterpretation, or that it will

1871 *Order.*

have any influence upon the Commission's valuation work now being conducted. It will be recalled that in the discussion of this question the report, among other things, says:

> From a consideration of all of the facts and matters of record, and which, under section
1872 15a of the interstate commerce act, we are both required and authorized to consider, we find that the value of the steam-railway property of the carriers subject to the act held for and used in the service of transportation is, for the purpose of this particular case, to be taken as approximating the following * * *.

1873 **ORDER.**

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 29th day of July, A. D. 1920.

Ex parte 74.

In the Matter of the Applications of Carriers in Official, Southern, and Western Classification Territories for Authority to Increase Rates.

1874

It appearing, That by its report entered in the above-entitled proceeding, which is hereby referred to and made a part hereof, the Commission authorized certain increases in the rates, fares, and charges of railroads within the continental United States;

1875 *It is ordered,* That all outstanding unexpired orders of the Commission, whether or not effective upon the date of this order, authorizing or prescribing rates, fares, and charges which have or have not been published at the date of this order, and all outstanding suspension orders, be, and they are hereby, modified to the extent neces-

sary to permit the increases herein authorized to 1876
be applied to the rates, fares, and charges authorized or prescribed in or maintained or held by virtue of said outstanding orders; but that in all other respects said orders shall remain in full force and effect.

It is further ordered, That all tariffs or supple- 1877
ments changing rates now maintained or held by virtue of outstanding orders of this Commission shall bear on their title-page the following:

> Rates shown in this supplement (or tariffs supplemented hereby) published under authority of outstanding orders of the Interstate Commerce Commission are increased 1878
> herein under authority of order of the Interstate Commerce Commission in docket No. 74 (Ex Parte), dated July 29, 1920.

And it is further ordered, That a copy of this order be served on each carrier party to said orders and that a copy thereof be inserted in the docket in each such proceeding. 1879

By the Commission.

[SEAL.] GEORGE B. McGINTY,
Secretary.

1880

INTERSTATE COMMERCE COMMISSION.

Ex Parte 74.

IN THE MATTER OF THE APPLICATIONS OF CARRIERS IN OFFICIAL, SOUTHERN, AND WESTERN CLASSIFICATION TERRITORIES FOR AUTHORITY TO INCREASE RATES.

1881

Ex Parte 74.

IN THE MATTER OF THE APPLICATIONS OF CARRIERS IN OFFICIAL, SOUTHERN, AND WESTERN CLASSIFICATION TERRITORIES FOR AUTHORITY TO INCREASE RATES.

1882

Decided August 11, 1920.

1. Supplementing the original report herein, 58 I. C. C., 220, percentage increases authorized upon freight traffic within Illinois teritory, and between that territory and points in certain other territories.

1883

2. Carriers authorized, in the publication of passenger fares, to round out fractions to the next whole cent.

Supplemental Report of the Commission.

By the Commission:

Following our original report herein, 58 I. C. C. 220, we were asked to indicate specifically the 1884
percentages of increase that should apply to freight rates, (1) within Illinois territory; (2) between points in Illinois territory and points in the eastern group; and (3) between points in Illinois territory and points in the western group.

The state of Illinois is so situated that it may be regarded, for transportation purposes, as 1885
partly within eastern territory and partly within western territory. Part of the state is embraced within official classification territory, and on traffic to and from the east the rates are usually governed by the official classification. On the other hand, some of the principal western rail-

Defendants' Exhibit.

1886 roads have their eastern termini within the state of Illinois, and on traffic to and from the west it has been the general practice to regard Illinois as being within western territory. Joint rates between that state and points west of the Mississippi River are governed by western classification. Because of these considerations, among
1887 others, the carriers have deemed it advisable to accord to the state of Illinois a basis of rates that partakes in part of the features of the eastern rate structure and in part of the features of the western rate structure.

Illinois territory embraces somewhat more than the state of Illinois proper, and for the purposes
1888 of this report may be defined as follows:

> All points in the state of Illinois, also points in Wisconsin on and south of the C. M. & St. P. Ry., Milwaukee to Madison, the C. & N. W. Ry. Madison to Dodgeville, and on and east of the Illinois Central, Dodgeville to the Illinois state line; also points on the west
> 1889 bank of the Mississippi River to which joint through rates subject to the official classification are now in effect from points in trunk line and central territories.

Upon further consideration of the record in this proceeding, we find that in the application of the increases authorized in our original report herein
1890 points in Illinois territory should be considered to be within the eastern group for the purpose of applying the increases on interstate traffic between points within Illinois territory; also on traffic between points in Illinois territory on the one hand and points in official classification territory east of the Indiana-Illinois state line on the

other, and that an increase of 40 per cent may be made in such rates; and points within said Illinois territory should be treated as being in the western group on traffic subject to joint or single line through rates between points in said territory on the one hand and points lying within the boundaries of the western group (west or north of Illinois territory) on the other, and that an increase of 35 per cent may be made in such rates.

DISPOSITION OF FRACTIONS IN PUBLISHING PASSENGER FARES.

In our original report we said, in effect that in computing passenger fares the carriers should follow the same rule for the disposition of fractions as was approved for the publication of freight rates where stated in amounts per 100 pounds or any other unit, except as otherwise specifically provided. Our attention is now called to the fact that it has long been the custom of the carriers in constructing passenger fares to round out fractions to the next full cent. It is our view that the practice heretofore observed may be applied in constructing the increased passenger fares, the surcharges for occupants of sleeping and parlor cars, and baggage charges, authorized in our original report.

An appropriate order will be entered.

ORDER.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 11th day of August, A. D. 1920.

Ex Parte 74

Defendants' Exhibit.

1896

In the Matter of the Applications of Carriers in Official, Southern and Western Classification Territories for Authority to Increase Rates.

Supplemental Order No. 1.

Upon further consideration of the record in the above-entitled proceeding, and for good cause
1897 shown:

It is ordered, That in the application of the increases authorized in the report in this proceeding entered July 29, 1920, points in Illinois territory should be considered to be within the eastern group for the purpose of applying the increases on interstate traffic between points within
1898 Illinois territory; also on traffic between points in Illinois territory on the one hand and points in official classification territory east of the Indiana-Illinois state line on the other, and that an increase of 40 per cent may be made in such rates; and points within said Illinois territory should be treated as being in the western group
1899 on traffic subject to joint or single line through rates between points in said territory on the one hand, and points lying within the boundaries of the western group (west or north of Illinois territory) on the other, and that an increase of 35 per cent may be made in such rates.

For the purposes of this order Illinois territory is defined as consisting of all points in the state
1900 of Illinois, also points in Wisconsin on and south of the C. M. & St. P. Ry., Milwaukee to Madison, the C. & N. W. Ry., Madison to Dodgeville, and on and east of the Illinois Central, Dodgeville to the Illinois state line; also points on the west

Defendants' Exhibit.

bank of the Mississippi River to which joint through rates, subject to the official classification, are now in effect from points in trunk-line and central territories.

By the Commission.

[SEAL.] GEORGE B. McGINTY,
Secretary.

INTERSTATE COMMERCE COMMISSION.

Ex Parte 74.

In the Matter of the Applications of Carriers in Official, Southern, and Western Classification Territories for Authority to Increase Rates.

Decided August 18, 1920.

Supplementing our original report, 58 I. C. C., 220, carriers authorized to increase rail-lake-and-rail rates between points on the Atlantic seaboard and interior points, on the one hand, and St. Paul and Minneapolis, Minn., and points grouped therewith, on the other, upon the same basis as is applied to corresponding rates to and from Duluth, Minn.

SECOND SUPPLEMENTAL REPORT OF THE COMMISSION.

BY THE COMMISSION:

It has been the practice of railroads serving the eastern group, in conjunction with certain boat

1906

Defendants' Exhibit.

lines operating on the great lakes, to publish joint rail-lake-and-rail rates between points along the Atlantic seaboard and numerous interior eastern points, on the one hand, and Chicago, Ill., Duluth, Minneapolis, and St. Paul, Minn., and other western points, on the other. In our original
1907 report, 58 I. C. C., 220, at page 253, we found that in the construction of rail-and-lake rates the present parity between Chicago and Duluth should be maintained. We authorized an increase of 40 per cent in the rates between eastern points and Chicago, the Duluth rates to be made on the Chicago basis. Minneapolis and St. Paul, here-
1908 inafter designated the twin cities, are in the western group, and the carriers were authorized, under a literal interpretation of our original report, to increase the twin cities' rates 33⅓ per cent, the basis generally approved for inter-territorial traffic. Our attention is directed to the fact that the rail-lake-and-rail rates to and
1909 from the twin cities bear a close relation to the corresponding rates to and from Duluth. The Duluth rates and the twin cities' rates are highly competitive, are published in the same tariffs, governed by the same classification, and it would obviously be not inappropriate to provide the same percentage of increase for both.

1910 The present rail-and-lake class rates from New York to Duluth and the corresponding rates to the twin cities are as follows:

Classes:	1	2	3	4	5	6
New York to Duluth.....	102½	91	69	48½	41	34½
New York to twin cities..	123½	109	82	56½	48	39½
Differentials	21	18	13	8	7	5

Defendants' Exhibit.

The above differentials were the result of our findings in *Commercial Club of Duluth* v. *B. & O. R. R. Co.*, 27 I. C. C., 639. To increase the Duluth rates by 40 per cent and the twin cities' rates by 33⅓ per cent would slightly reduce the differential on some of the lower classes, although there has been a substantial increase in Duluth's inbound and outbound rates since 1913, when the last-mentioned case was decided.

We are convinced that a literal application of our original report will operate to the undue disadvantage of Duluth. Our findings are therefore modified so as to authorize the same percentage increases in the twin cities' rates as were approved for the rates to and from Duluth.

By the Commission.

[SEAL.] GEORGE B. McGINTY,
Secretary.

98

Filed Oct. 25. 1921.
C. H. Huggins
Clerk.

1916 DEFENDANTS' EXHIBIT.

STATE OF NEW YORK

PUBLIC SERVICE COMMISSION
SECOND DISTRICT

1917 At a Session of the Public Service Commission, Second District, held in the city of Albany on the 19th day of August, 1920.

Present:

CHARLES B. HILL, *Chairman*
FRANK IRVINE,
JOHN A. BARHITE,
1918 JOSEPH A. KELLOGG,
GEORGE R. VAN NAMEE,
Commissioners.

1919 Petition of Steam Railroad Carriers for relief from the provisions of section 36 of the Public Service Commissions Law as amended June 9, 1917, with respect to freight rates and charges. [Case No. 7693.] } Special Permission Order No. 7363.

1920 Upon applications of record, hearings August 10 and 17, 1920, on behalf of steam railroad carriers subject to this Commission's jurisdiction, requesting this Commission, under authority conferred upon it by the Public Service Commissions Law, sections 28 and 29 respectively, to modify its freight tariff rules (Circular No. 68), to permit amending tariffs by special form of supple-

ment, in form as authorized by the Interstate Commerce Commission's Special Permission No. 50340, a copy of which was filed as a part of such applications, and to permit posting and filing such special form supplements on less than statutory notice; the applicants having publicly stipulated at hearing that in case short notice filing is authorized and consummated, this Commission shall be deemed to have reserved its power to at any time or times, within thirty days after such short notice filings, to suspend any rates, or charges, or rules, regulations, or practices affecting rates or charges involved, either upon complaint or upon its own initiative, with the same effect as though short notice filing had not been authorized and for reasons stated in the Opinion of this Commission in the above entitled case, it is

Ordered: 1. That the Interstate Commerce Commission's Special Permission No. 50340 of date August 5, 1920, be and it is hereby made a part of this permission except as herein otherwise changed.

Ordered: 2. That the provisions of Circular No. 68 (tariff rules) be and they are hereby temporarily waived to the same extent that the Interstate Commerce Commission by its Special Permission No. 50340 of date August 5, 1920, temporarily waived corresponding provisions of its tariff Circular No. 18-A.

Ordered: 3. That the carriers, applicants in this case (No. 7693), as to changes in freight rates or charges other than as to rates or charges applicable to the transportation of fluid milk and

1926 *Defendants' Exhibit.*

cream in freight train service, be and they are hereby permitted to file special supplements to freight tariffs currently in effect, or to tariffs which are filed or may be filed to become effective prior to September 1, 1920, to provide for the changes in rates and charges applicable to New
1927 York state traffic, approved by the Interstate Commerce Commission in its opinion dated July 29, 1920, in Ex Parte No. 74, as applicable to such traffic; provided, that such special supplements shall be issued substantially in the manner and form (adjusted to fit this Commission's rules) as shown in Exhibit "A" attached to and made a part of said Interstate Commerce Commission's
1928 Special Permission No. 50340 of date August 5, 1920.

Ordered: 4. That schedules issued under authority of this permission may be filed on three days' notice to the public and this Commission.

Ordered: 5. That this permission is available
1929 to carriers operating railroads by power other than steam, in cases where such carriers conduct freight transportation, either locally or jointly with other carriers, by rail in like manner to that employed by steam railroad carriers and where their rates and charges applicable to such transportation are governed by Official Classification.
1930 This authority does not waive any of the provisions of the Public Service Commissions Law nor any of the requirements of this Commission's published rules relating to the construction and filing of freight tariff publications except as herein provided; it is given in order that uniform charges and regulations may obtain as to intra-

state and interstate traffic under the Interstate Commerce Commission's report in Ex Parte 74, of date July 29, 1920. This Commission does not hereby, in any respect whatsoever, approve any rates or charges, or rules, regulations, or practices, affecting rates or charges that may be established under this special permission, all or any of such rates or charges, or rules, regulations, or practices being subject to suspension at any time or times within thirty days after filings upon complaint to this Commission or upon its own initiative, also subject at any time to complaint, investigation, and correction if in conflict with any provisions of law.

By the Commission,

[SEAL]

[*Signed*] FRANCIS E. ROBERTS,
Acting Secretary.

STATE OF NEW YORK,
PUBLLIC SERVICE COMMISSION, } *ss.:*
SECOND DISTRICT.

I have compared the preceding copy with the original on file in this office, and I do hereby certify the same to be a correct transcript therefrom and of the whole thereof.

Witness my hand and the seal of the Public Service Commission, Second District, at the city of Albany this twenty-fourth day of February, one thousand nine hundred and twenty one.

FRANCIS X. DISNEY,
Secretary.

1936 *Defendants' Exhibit.*

INTERSTATE COMMERCE COMMISSION

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, held at its office in Washington, D. C., on the 5th day of August, A. D. 1920.

1937

SPECIAL PERMISSION NO. 50340.

Whereas, Carriers have represented to the Interstate Commerce Commission that increased freight rates are necessary to meet operating expenses and to insure returns on property permitted by Section 15(a) of the Interstate Com-
1938 merce Act;

And whereas, Carriers have requested such modification of the tariff rules of the Commission as will permit the filing of special supplements to freight tariffs in abbreviated form, thereby enabling them, in the present emergency, to secure in an economical and expeditious manner in-
1939 creased revenue to be derived from such increases in freight rates; and

It appearing, That the Commission's rules and regulations, Tariff Circular 18-A, in section (b) of Rule 4 require tariff publications to show the forms and numbers of powers of attorney and concurrences under authority of which partici-
1940 pating carriers are named; in section (i) of Rule 4 require an explicit statement of rates, in cents or in dollars and cents, per 100 pounds, per barrel, or other packages, per ton or per car, together with the name or designation of the places from and to which they apply; in section (e) of Rule 9

limit the number of, and the volume of effective supplements to any tariff and forbid supplements to tariffs issued in loose-leaf form, and tariffs of less than five pages; in section (k) of Rule 9 prohibit a change in any rate sought to be increased by a rate which is under suspension by order of the Commission; and in section (a) of Rule 54 1942
provide that rates filed must be allowed to go into effect, and cannot be changed for at least thirty days after the date when the rates have become effective.

It is ordered, That the provisions of Tariff Circular 18-A in Rules 4(b), 4(i), 9(e), 9(k) and 54(a), be, and they are hereby temporarily waived 1943
in the particulars *hereinafter* set forth, but not otherwise, as to, and confined to, special supplements filed under authority hereof; *Provided,* That there shall not be in effect at any one time more than one such special supplement to the same tariff other than the special supplement providing minimum weights on grain and the prod- 1944
ucts of grain and commodities listed therewith;

It is further ordered, That carriers be, and they are hereby permitted to file special supplements to freight tariffs to provide for the changes in rates and charges approved by the Commission in its opinion dated July 29, 1920, in Ex Parte No. 74; *Provided,* That such special supplement 1945
shall be issued substantially in the manner and form shown in exhibit "A" attached hereto and made a part hereof, which form may be, where necessary, modified to the extent necessary to clearly indicate the increases authorized in the report in Ex Parte No. 74, *Provided,* That such

1946 *Defendants' Exhibit.*

modifications shall in all particulars conform to all other provisions herein; and further provided that such special supplement may be issued and filed amending schedules containing rates to become effective upon a later date and those which have not been in effect for thirty days;

1947 *It is further ordered,* That carriers be, and they are hereby, permitted to file regular supplements to freight tariffs which shall explicitly publish the said increased freight rates in manner and form required by section (i) of Rule 4 of Tariff Circular 18-A, without regard to the number of or volume of the effective supplements to the tariffs thus
1948 supplemented;

It is further ordered, First: That such special supplement may be designated as supplement to one or more tariffs, including loose-leaf tariffs and tariffs of less than five pages when desirable, may be filed without regard to the number of or the volume of the effective supplements to the
1949 tariff thus supplemented, and need not specifically name carriers participating therein or show power of attorney or concurrence forms and numbers;

Second: That such special supplement shall be posted with each tariff to which it is a supplement, as required by the Commission's order of October
1950 12, 1915;

Third: That such special supplement may not contain any matter other than the provisions for increasing freight rates and charges referred to;

Fourth: That no special supplement, issued in the form herein authorized to be filed, shall at any

time be reissued in like form unless authorized 1951
by special permission of the Commission;

Fifth: That, unless otherwise authorized by the Commission, no subsequently filed supplement to a tariff may be made subject to the rules or rates contained in the special supplement herein authorized to be filed; and that each subsequent supplement shall bear at top of its title page the 1952
following notation in bold type, viz.:

> "Rates and charges named in this supplement are not subject to increases shown in Special Supplement No. ....."

Sixth: That except as otherwise provided supplements to tariffs issued and filed subsequent to 1953
the filing of the special supplement herein authorized shall conform in all particulars with the Commission's rules and regulations, Tariff Circular 18-A; *Provided,* That a rate or rates reissued from a previous supplement shall be revised so as not to change such rates as applicable under the special supplement and shall be shown as re- 1954
issued items in the customary manner, the effective date of such reissued item or items to be the date upon which the change was effected by the special supplement;

It is further ordered, That carriers or agents whose tariffs are supplemented hereunder, be, and they are hereby, required to reissue not less 1955
than sixteen and two-thirds (16⅔) per cent of the number of pages contained in all tariffs supplemented under authority of this special permission within three months from September 1, 1920, and to reissue not less than the same number of pages

Defendants' Exhibit.

1956 of said tariffs each three months thereafter until all tariffs so supplemented shall have been reissued; and

It is further ordered, That each carrier and agent, on or before October 1, 1920, shall report the total number of pages in tariffs supplemented
1957 under authority of this special permission, and shall report each three months thereafter, the number of pages of said tariffs as to which the special supplement has been canceled in full.

This special permission is void if schedules issued hereunder are not filed with the Commission on or before October 1, 1920.

1958 By the Commission, Division 2:

[SEAL] GEORGE B. McGINTY,
Secretary.

EXHIBIT "A" (Title Page)

1959 SPECIAL SUPPLEMENT TO TARIFFS
Issued by

(Name of carrier, carriers or agents.)

APPLYING IN CONNECTION WITH PARTICIPATING CARRIERS SHOWN IN TARIFFS AND SUPPLEMENTS THERETO ENUMERATED HEREIN.

1960 INCREASE IN RATES.

Rates named in tariffs and supplements thereto, listed on pages — to —, inclusive, are hereby increased to the rates shown in Column B of rate tables on pages — to —, inclusive.

(See Application of Rates, Page 2)

Defendants' Exhibit.

This schedule contains rates that are departures from the terms of the amended Fourth Section of the Interstate Commerce Act, under authority of Interstate Commerce Commission, Fourth Section Order No. 7700 of August 4, 1920.

Rates shown in tariffs supplemented hereby published under authority of outstanding orders of the Interstate Commerce Commission are included herein under authority of order of the Interstate Commerce Commission in Docket No. 74 (Ex Parte), dated July 29, 1920.

Rates shown in tariffs supplemented hereby, published under authority of released rate orders heretofore approved by the Interstate Commerce Commission, increased as herein provided, are approved under authority of Released Rates Order No. 149 of July 28, 1920. This order must not be construed as approving under the 20th Section of the Interstate Commerce Act, rates based on value of the commodity shipped, which have not been approved by the Commission.

The form of this supplement is permitted by authority of Interstate Commerce Commission, Special Permission No. 50340 of August 5, 1920.

The increased rates and charges shown herein are established on five days' notice under authority of the opinion of the Interstate Commerce Commission in Ex Parte No. 74.

Issued ..... ~~Elective~~ Effective .....

.....

Issuing officers or agents.

3999

1966 *Defendants' Exhibit.*
(Page 2)

APPLICATION OF RATES.

Effective ....., 1920.

Class and commodity rates,

Charges for switching, transit (including stop-
1967 ping cars to partially load and unload), weighing, diversion, reconsignment, lighterage, floatage, storage (not including track storage), and transfer, then in effect, named in tariffs enumerated herein and in prior supplements thereto, as indicated, to each of which tariffs this is a special supplement, are increased to the rates shown in
1968 Column B in Table of Rates on Pages — to —, inclusive, hereof, except as otherwise provided below.

If a tariff or a prior supplement to a tariff enumerated herein contains rates to become effective upon a later date as indicated thereon, such rates will, on such later effective date, be increased
1969 to the rates shown in Column B in the Table of Rates, except as otherwise provided below.

If a tariff or a prior supplement to a tariff enumerated herein contains arbitraries, differentials or local rates to be used in connection with base rates, the table of increased rates shall be applied to each of such factors in determining the increased total rates.

1970

EXCEPTIONS.

Where a tariff, or a prior supplement to a tariff enumerated herein, provides for the absorption, in whole or in part, of another carrier's charges for the special services enumerated

 1971

above, the amount of the absorption will be increased by the amount that the charge for the service is increased.

This supplement does not increase —

Rates on iron ore from Minnesota or Michigan ranges to Lake Superior or upper Lake Michigan ports; 1972

The minimum charge of 50 cents per shipment for less-than-carload traffic;

The minimum charge of $15 per car, on carload traffic;

The minimum scale for class ~~dates~~ rates;

The charges for special services not enumerated above. 1973

RULES.

(Rules 1 to 7, inclusive, are subject to Rule 8.)

RULE 1 — RATES IN CENTS (EXCEPT CENTS PER CAR.)

Where rate is stated in cents per hundred pounds, per package, per ton, per shipment or other unit (except rates in cents per car — see Rule 6), find such rate in Column A and apply the rate shown opposite thereto in Column B. 1974

RULE 2 — RATES IN DOLLARS PER HUNDRED POUNDS.

Where rate is stated in dollars or fractions of a dollar, or dollars and cents, per hundred pounds, use the equivalent in cents per hundred pounds, find such equivalent in Column A and apply the rate opposite thereto in Column B. 1975

1976 *Defendants' Exhibit.*

RULE 3 — RATES IN DOLLARS (EXCEPT PER HUNDRED POUNDS, PER TON OR PER CAR.)

Where rate is stated in dollars or fractions of a dollar, or dollars and cents, per unit (other than per hundred pounds, per ton or per car — see Rules 2, 4 and 5, respectively), use the equiva-
1977 lent in cents per unit, find such equivalent in Column A and apply the rate shown opposite thereto in Column B.

RULE 4 — RATES IN DOLLARS PER TON.

Where rate is stated in dollars or fractions of a dollar, or dollars and cents, per net or gross ton, use the equivalent in cents per net or gross
1978 ton, find such equivalent in Column A and apply the rate shown opposite thereto in Column B.

Example: (May be shown in accordance with increases as authorized by the Commission.)

RULE 5 — RATES IN DOLLARS PER CAR.

(a) Where rate is stated in dollars or fractions
1979 of a dollar, or dollars and cents, per car, regardless of weight, use the figures in Column A as expressing dollars and fractions thereof, or dollars and cents, and apply the rate shown opposite thereto in Column B.

Example: (May be shown in accordance with increases as authorized by the Commission.)

1980 (b) Where rate is stated in dollars or fractions of a dollar, or dollars and cents per car of a specified weight, and it is provided that excess weight will be charged for in proportion, first determine the increased per car charge, by the method shown in Rule 5(a), and then determine the charge on the actual weight by the following method:

1981 If an increased rate of $38.00 applies per car of 20000 pounds, the charge for a car of 26000 pounds will be 26000/20000 of the rate for 20000 pounds, thus $38.00 x 26/20 equals $49.40 and under Rule 8(b) the charge for a car of 26000 pounds is $49.50.

1982 RULE 6 — RATES IN CENTS PER CAR.

(a) Where rate is stated in cents per car regardless of weight, find the equivalent in dollars, or dollars and cents in Column A, as expressing dollars or fractions of a dollar, or dollars and cents, and apply the rate shown opposite thereto in Column B.

1983 Example: (May be shown in accordance with increases authorized by the Commission.)

(b) Where rate is stated in cents per car of a specified weight and it is provided that excess weight will be charged for in proportion, first determine the increased per car charge by the method shown in Rule 6(a), and then determine the charge on the actual weight by the following 1984 method:

If an increased rate of $64.50 applies per car of 20000 pounds, the charge for a car of 26000 pounds will be 26000/20000 of the rate for 20000 pounds, thus $64.50 x 26/20 equals $83.85, and under Rule 8(b) the charge for a car of 26000 pounds is $84.00.

1985 RULE 7 — RULE FOR ARRIVING AT RATES HIGHER THAN SHOWN IN RATE TABLE.

Where rates are higher than found in Column A, such rates will be increased the per cent shown in connection with the rate table applicable, ob-

Defendants' Exhibit.

1986 serving Rules 1 to 6, inclusive, and Rule 8 in obtaining the increased rates.

RULE 8—RULES FOR DISPOSITION OF FRACTIONS.

In computing or applying all increased rates as provided for herein, fractions will be disposed of as follows:

1987 (a) Where rates are stated in amounts per 100 pounds or any other unit, except as provided in the succeeding paragraph, fractions of less than ¼ of a cent will be omitted. Fractions of ¼ of a cent or greater, but less than ¾ of a cent will be stated as ½ cent. Fractions of ¾ of a cent or greater will be increased to the next whole cent.

1988 (b) Where rates are stated in dollars per carload, including articles moving on their own wheels, when not stated in amounts per 100 pounds or per ton, amounts of less than 25 cents will be dropped, thus, $25.24 will be stated as $25. Amounts of 25 cents or more, but less than 75 cents will be stated as 50 cents; thus $25.65 will

1989 be stated as $25.50. Amounts of 75 cents or more, but less than $1 will be raised to the next even dollar.

1990

Defendants' Exhibit. 1991

EXHIBIT "A."

(Page 4 and subsequent pages).

TABLE OF RATES.

Subject to application of rates and to rules, pages — and —.

1992

A		B
Over	But not over	
.....	.....	
.....	.....	
.....	.....	

1993

When rates are higher than found in Column A, such rates will be increased as per Rule 7.

(Add lists of tariffs by I. C. C. numbers to which this is a special supplement, followed by the special supplement numbers, and the numbers of supplements subject to the special supplement. Other Commissions and carriers' serial numbers may be shown.) 1994

July 26-1921 C.M. Hegquist Clerk

DEFENDANTS' EXHIBIT.

STATE OF NEW YORK

PUBLIC SERVICE COMMISSION 1995

SECOND DISTRICT

At a Session of the Public Service Commission, Second District, held in the city of Albany on the 26th day of August, 1920.

1996 *Defendants' Exhibit.*

Present:

CHARLES B. HILL, *Chairman,*
FRANK IRVINE,
JOHN A. BARHITE,
JOSEPH A. KELLOGG,
Commissioners.

1997

In the Matter of the Application of Steam Railroad Carriers in the State of New York for Permission to Increase Freight Rates and Charges on Less than Statutory Notice; and for Relief from the Provisions of Section 36 of the Public Service Commissions Law, as Amended June 9, 1917, with Respect to Freight Rates and Charges. [Case No. 7693.]

1998

Amending Special Permission Order No. 7363.

1999 Upon petition of committee on behalf of steam railroad carriers subject to this Commission's jurisdiction applying for an order supplemental to this Commission's Special Permission Order No. 7363, dated August 19, 1920, in case No. 7693, amending said special permission order so as to make its terms apply to tariffs containing joint freight rates applicable to traffic transported 2000 partly by rail and partly by water between points and over routes wholly within the State of New York, it is

Ordered: That Special Permission No. 7363, dated August 19, 1920, in case No. 7693, be and it hereby is amended as of date August 19, 1920,

Defendants' Exhibit.

by adding thereto, immediately after ordered five clause, the following

"*Ordered:* 6. That the terms of this permission also applies to tariffs containing joint freight rates applicable to traffic, except milk and cream, transported partly by rail and partly by water between points and over routes wholly within New York state."

By the Commission.

[SEAL] (Signed) FRANCIS E. ROBERTS,
Acting Secretary.

STATE OF NEW YORK,
PUBLIC SERVICE COMMISSION, SECOND DISTRICT, } *ss.:*

I have compared the preceding copy with the original on file in this office, and I do hereby certify the same to be a correct transcript therefrom and of the whole thereof.

Witness my hand and the seal of the Public Service Commission, Second District, at the city of Albany this twenty-fourth day of February one thousand nine hundred twenty-one.

[L. S.]

FRANCIS X. DISNEY,
Secretary.

Filed Feb. 26 1921.
C. W. Higginson Clerk.

Defendants' Exhibit.

2006 In the Matter of the Application of STEAM RAILROAD CARRIERS in the State of New York for Permission to Increase Freight Rates and Charges on Less than Statutory Notice for Relief 2007 from the Provisions of Section 36 of the Public Service Commissions Law of the State of New York as Amended June 9, 1917, with Respect to Freight Rates and Charges.

Ex H
1 C.J.

Case No. 7693

2008 1. The Interstate Commerce Commission granted to all steam railroads within the Eastern Group authority to make effective on short notice increases in freight rates amounting to 40 per cent of existing rates, except as to milk, cream, and articles heretofore taking the same rates. Application was made to this Commission by the steam railroads subject to its jurisdiction for permission 2009 to file effective on short notice similar tariffs relating to intrastate rates. The proceedings before the Interstate Commerce Commission in evidence in this case showing that the Railroads of the Eastern Group are entitled to a substantial increase in rates, and that the railroads within this State are probably entitled to like increases, and the petitioners stipulating that any rate or rates may 2010 be suspended at any time within thirty days after the filing of the tariffs in the same manner as if they had not yet become effective, the Commission granted permission to file such tariffs effective concurrently with the new interstate tariffs, being moved thereto

by a consideration of the disturbance in railroad and all other business if the general interstate and intrastate freight structures should even for a time be widely different.

2. In granting the permission the Commission indicated neither approval nor disapproval of the rates, and permitted their institution subject to complaint, investigation, and suspension under the law and the stipulation.

3. An increase of 20 per cent in the rate on milk, cream, and certain similar commodites was asked. These commodities were treated by the Interstate Commerce Commission in connection with passenger rates. This Commission expected the rates on these commodities from the operation of the short notice permission and left them to be dealt with in connection with passenger rates.

Decided August 19, 1920.

Appearances:

Francis W. Brown, 53 Lancaster street, Albany, freight rate clerk of the New York State Highway Commission.

M. Maldwin Fertig, Assistant Corporation Counsel, City of New York, Municipal Building, New York city.

John J. McManus, Assistant Corporation Counsel, City of Albany, 13 North Pearl street, Albany.

Frank E. Williamson, 414 Chamber of Commerce, Buffalo, for the Buffalo Chamber of Commerce.

J. G. Duffy, Utica, for the Utica Chamber of Commerce.

George T. Russell, Vice-president of the Traffic Club, Inc., Troy.

Defendants' Exhibit.

2016 *L. E. Schlechter,* 200 Fifth avenue, New York city, attorney for the National Council of Traveling Salesmen's Associations and subsidiary organizations.

Frank E. Grace, traffic secretary, Brooklyn Chamber of Commerce, Brooklyn.

2017 *Ernest J. Tarof,* chairman of the transportation committee of the New York Board of Trade and Transportation; and traffic manager of the Brunswick-Balke-Collender Company of New York, 29 West 32d street, New York.

P. W. Moore, manager of traffic and industrial bureaus of the Chamber of Commerce of the Borough of Queens, New York city, and secretary 2018 of the Shippers' Conference Committee of Greater New York.

James C. Lincoln, 233 Broadway, New York city, representing the Merchants Association of New York.

J. D. Negus, 1190 Broadway, New York city.

Martin S. Decker, 180 Washington avenue, Albany, representing the Remington Paper & Power 2019 Company of Watertown.

S. R. Moyer, Scranton, Penna., for the International Salt Company of New York.

E. D. Conklin, Richfield Springs, for the Southern New York Power and Railway Corporation.

W. L. Sporborg, 531 Union Building, Syracuse, 2020 for the Rock-Cut Stone Company, and New York Crushed Stone Association.

C. C. Paulding, Grand Central Terminal, New York city, with a committee.

G. H. Ingalls, Vice-president, New York Central Lines; *W. S. Kallman,* commerce assistant to the Vice-president; and *L. F. Vosburgh,* traffic manager.

Defendants' Exhibit.

J. A. Middleton, Vice-president, Lehigh Valley Railroad Company; and *H. C. Hamilton*, general freight agent. 2021

E. P. Bates, Broad Street station, Philadelphia, Penna., assistant freight traffic manager, The Pennsylvania Railroad Company.

Donald Wilson, 302 Pennsylvania station, New York city, general freight agent, Long Island Railroad Company. 2022

William J. Kennedy, West New Brighton, representing the Staten Island Rapid Transit Railway Company.

H. E. Huntington, general passenger agent, Buffalo, Rochester and Pittsburgh Railway Company; *R. W. Davis*, freight traffic manager; and *James Main*, counsel, 1015 Insurance Building, Rochester. 2023

C. L. Chapman, general freight agent, Erie Railroad Company; and *Thomas C. Powell*, vice-president of traffic.

Daniel Willard, President of the Baltimore and Ohio Railroad Company, Baltimore, Md., and also representing carriers in the Eastern Group generally; and *George M. Shriver*, Baltimore, Md., attorney representing eastern roads and the Baltimore and Ohio Railroad Company. 2024

Frederick L. Lovelace, Niagara Falls, for the Niagara Junction Railway Company.

Frank Burton, Gloversville, attorney for Fonda, Johnstown and Gloversville Railroad Company. 2025

H. C. Hamilton, general freight agent of the Lehigh Valley Railroad Company, in behalf of the Buffalo Creek Railroad.

G. A. Blackmon, Lowville, for The Lowville and Beaver River Railroad Company.

Defendants' Exhibit.

2026 *William Humphrey,* Dansville, for the Dansville and Mount Morris Railroad Company (A. S. Murray, jr., Receiver).

W. J. Mullin, general traffic manager, The Delaware and Hudson Company.

F. P. Gutelius, Vice-president, The Delaware and Hudson Company.

2027 *R. Van Ummerson,* freight traffic manager, Boston and Albany Railroad Company.

W. A. Steenbergh, Newburgh, for the Central Hudson Steamboat Company.

J. G. Hackett, Rutland, Vt., for the Rutland Railroad Company.

2028 By the Commission:

The steam railroad carriers subject to the jurisdiction of this Commission ask the Commission to issue a special permission order authorizing such carriers to issue and file with the Commission, effective August 26, 1920, tariffs or supplements to tariffs providing for an increase of 40 per cent in all existing freight rates, except rates

2029 on fluid milk, cream, and articles taking same rates, whether transported in ordinary freight trains or special milk trains; an increase of 20 per cent in rates on fluid milk, cream, and articles taking same rates; and an increase of 40 per cent in charges for switching, transit, weighing, diversion, reconsignment, lighterage, floatage, storage

2030 (not including track storage) and transfer, where the carriers provide separate charges against shippers for such services, also the revision of switching absorption tariffs so as to provide for the revision of switching absorptions in accordance with the increased switching charges peti-

tioned for, subject to the rules and conditions prescribed by the Interstate Commerce Commission as to interstate rates and charges contained in its opinion in the matter of the Application of Carriers for Authority to Increase Rates (Ex Parte No. 74) dated July 29, 1920. 2031

It is in evidence on the application and indeed it is a matter of common knowledge that the Interstate Commerce Commission in the case above referred to authorized such increases as to interstate traffic in what was designated as the Eastern Group, including, roughly speaking, the northeastern part of the United States and extending southerly to lines in Virginia and West Virginia and westerly to lines in Illinois. The application to this Commission is based not only upon the alleged revenue necessities of the petitioners but also upon established relationships between intrastate and interstate rates and a necessity of avoiding undue preferences or unjust discriminations which would result should there be a substantial difference in rate structures and bases as between traffic wholly within the State of New York and traffic moving interstate. 2032 2033 2034

The evidence submitted consists of the entire record including the evidence, opinion, and order in the proceeding before the Interstate Commerce Commission known as Ex Parte No. 74, the testimony of Mr. Daniel Willard as to the general situation and needs of the carriers, and certain formal documentary proof. At a hearing held at Albany, August 17, 1920, after general notice given to the press and special notice to municipal officers, chambers of Commerce, and other commercial bodies, a large number of persons attended 2035

and no one voiced opposition to the general purpose of the petition. A large number of letters and telegrams have also been received from commercial bodies and shippers, nearly all of them urging the Commission to grant the petition. On the hearing, however, objection was made to extending the proposed increase to certain particular classes of traffic. The Corporation Counsel of the City of New York was represented for the purpose of asking an adjournment in order to afford time to make a thorough investigation of the subject. The disposition we are about to make of the case amply protects all these interests.

The evidence before the Interstate Commerce Commission discloses the necessity of some very substantial increases in rates in order to enable the carriers generally to meet their obligations to the public, and especially to meet the requirements of the Transportation Act of 1920. The findings on this subject of the Interstate Commerce Commission, while not binding upon this Commission in the present proceeding, are not without strong probative force. We have no evidence that the situation of the petitioning carriers, in so far as their purely intrastate business within the State of New York is concerned, is similar to that of all the carriers in the Eastern Group as to their entire traffic. We are not, however, called upon in this proceeding to determine finally the justice or reasonableness of any or all of the intrastate rates proposed. Under the law of this State the carriers might file tariffs containing the proposed increases, and they would become effective after thirty days unless upon complaint or on its own motion the Commission should suspend

2041 any or all of them pending an investigation as to their reasonableness. On the hearing it was stipulated on behalf of the petitioners that if permission were given to make the tariffs effective on short notice any rate or rates therein contained might be suspended at any time within thirty days after the filing thereof in the same 2042 manner as if they had not yet become effective. This retains to the Commission all the power that it would have to investigate and adjust the rates if the tariffs were filed under the general provisions of sections 28 and 29 of the Public Service Commissions Law.

2043 The evidence before us establishes a fair probability if not a presumption that a general substantial increase in rates is necessary. The inter state rates by permission of the Interstate Commerce Commission are to become effective August 26, 1920. If the present petition is not granted there will, at the very best, result a considerable period of time during which the interstate increases will be effective and the intrastate rates 2044 will remain on the present basis. The interstate increases allowed are universal and so great in amount that there would result a very great disparity between interstate and intrastate rates. This would have a disturbing influence on business of all character and the disturbance might prove disastrous in some lines. There 2045 would also result a multitude of unwarranted discriminations with violations of the long and short haul clause and of the rule that through rates must not exceed the sum of the locals. The rates of the New York Central between New York and Buffalo, to mention a single instance, would be

Defendants' Exhibit.

2046 approximately 40 per cent lower than those on the Lackawanna, Lehigh Valley, Erie, and Pennsylvania. The consequence of this state of affairs for even a short period can readily be imagined.

Sound public policy and commercial necessity both dictate that a special permission should be granted, but in granting it the Commission does 2047 not indicate its approval or disapproval of the rates contained in the tariff. These will be subject to complaint, investigation, and suspension if the propriety of suspension in any case is made to appear.

The foregoing applies to freight rates generally with other incidental special charges. In so far 2048 as the petition asks an increase of 20 per cent in rates on fluid milk, cream, and articles taking the same rates, the Interstate Commerce Commission treated this traffic on the same basis as it treated the passenger rates because milk and cream are usually carried in passenger trains. It may be that in this State the great bulk of milk and cream is carried in special milk trains, but their 2049 equipment and movement harmonize more closely with passenger operation than with freight operation. Fluid milk, cream, and articles taking the same rates should therefore be excepted from the operation of this order.

Filed Feb. 25. 1921. C. W. Huggins Clerk

DEFENDANTS' EXHIBITS.

2050 INTERSTATE COMMERCE COMMISSION

WASHINGTON. (E & E)

I, George B. McGinty, Secretary of the Interstate Commerce Commission, do hereby certify that the attached are true copies of extracts taken from pages 260, 261, 268, 301, and 305, and of

Defendants' Exhibit.

pages 302, 303, and 304, of the transcript of the stenographer's notes of oral argument held at Washington, D. C., before the Commission, on October 12, 1920, in Docket No. 11623, in the Matter of Rates, Fares, and Charges of the New York Central Railroad Company and other Railroad Companies in the State of New York, and in Docket No. 11703, in the Matter of Interstate Rates within the State of Illinois, the originals of which are now on file and of record in the office of this Commissioner.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of said Commission this 12th day of January, A. D. 1921.

(L. S.)

GEORGE B. McGINTY,
Secretary of the Interstate Commerce Commission.

Commissioner Aitchison: Mr. Benton, you said that in the Nevada case the record had not been put in: you were uncertain what the proceeding was in respect to the New York case. Now, in this proceeding is the record in Ex Parte 74 made of record?

Mr. Benton: I understand it is. Mr. Hale will correct me if I am wrong.

Mr. Hale: I understood Mr. Paulding to refer to the order of the Commission in Ex Parte 74, and Mr. LaRoe to say that it need not be formally introduced; that it would be considered by the Commission.

Commissioner Aitchison: How about the underlying testimony?

2056 Mr. Hale: There was nothing of that kind done.

Mr. Thom: May I ask Mr. Commissioner Aitchison's attention to page 69 of the carriers' brief in the New York case, which shows that the entire evidence was before the state commission in this matter.

2057 Commissioner Aitchison: I am wondering whether it is here.

Mr. Thom: I think it is here as a matter of judicial notice. It was before the Commission.

Commissioner Aitchison: But under our rules?

Mr. Thom: I thing it is here under your rules.

2058 Mr. Thom: Mr. Chairman, and gentlemen: I assume that you have before you the entire record in Ex Parte 74. I assume that that is before you, by virtue of your rules. If it is not, I desire to offer it now.

Chairman Clark: There has been some question raised about that before, and perhaps it is
2059 well to have an understanding on it before we proceed any further. I am not to be understood as indicating what may be found necessary in these proceedings. It has been suggested here that further hearings should be had, and other suggestions of somewhat similar nature have been thrown in. If there are to be any further pro-
2060 ceedings or hearings, it seems obvious that a thorough understanding that the record in Ex Parte 74 is in each of these cases will obviate the necessity of a wide range of duplication that might otherwise occur. So I ask if there is any objection to a distinct understanding that the

record in Ex Parte 74 before this Commission 2061
and the state commissioners who were associated with us, may be considered as in the record in these two cases, or each of these cases?

Mr. Hale: On behalf of New York, I might briefly state the situation. The record was, as I understand, introduced before the Public Service 2062
Commission, but, in the hearing before Mr. LaRoe, it was not introduced. Simply the order was introduced. I consent, however, that it may be considered as having been introduced.

Mr. Helm: Mr. Chairman, I would like one further explanation in regard to the procedure. The contention of the carriers in the West 2063
uniformly is that the only competent evidence at all before the state commissions is the record made before this Commission in Ex Parte 74, and have interposed formal objections to the introduction of any testimony whatever exclusive of that contained in that record. Now, I think it was thoroughly understood by everybody appear- 2064
ing in Ex Parte 74 that that record should be accepted by all the state commissions so far as it was applicable to any issue before the state commissions, and it has been so received by the commissions. But is it to end with that? Are we to have no other testimony, with the request to sign on the dotted line? That is our proposition, 2065
in the West.

Chairman Clark: I do not think, Judge Helm, that that quite touches the question we have here. That is a question of what shall be admitted in the record in the proceedings before state com-

missions. The only question here is as to this case now before this Commission.

Mr. Helm: I think there was no stipulation with regard to that.

Chairman Clark: Copies of the full record in Ex Parte 74 were furnished to the various state commissions, with the idea that they would keep themselves advised, and that they would be able to avail themselves of it and obviate the necessity of duplicating much of it in each of the several states to which applications were made for authority to increase the state rates correspondingly with those made interstate.

Mr. Helm: There was a thorough understanding between the Commission and the carriers that that should be done.

Chairman Clark: The Commission having had that record, and the carriers having had that record, and it having been made before this Commission, this matter coming on in its present aspect, the suggestion now is only that it may be distinctly understood, beyond later controversy, that the record is agreed to be incorporated and considered in the proceedings now before us.

Mr. Culver: My recollection is that in the Illinois hearing the record was offered and admitted over objection by the State. Mr. Commissioner Meyer will probably remember that.

Commissioner Meyer: That was not so.

Mr. Culver: My recollection is we objected to the introduction of the record, and it was taken subject to objection.

Defendants' Exhibit.

Commissioner Aitchison: What was the ground of objection? 2071

Mr. Culver: I do not remember the exact details. I think they are in the record. I think the principal objection was that we were no parties to Ex Parte 74. However, the record will show the objections.

Chairman Clark: This is another proceeding. Do you assent to its being considered in this record now? 2072

Mr. Culver: I cannot consent to that, if I objected before, because this is merely an argument of the hearing that has already taken place. My recollection is that we objected to it, and if I objected then, I want the objection to remain. The Commission can either accept it or overrule it. 2073

Mr. Thom: This is a continuance of the hearing in the Illinois case, and the whole proceeding being under the power of this Commission, I move that it be admitted.

Chairman Clark: The objection to the admission of the record in Ex Parte 74 is overruled, and it will be considered as in this case. 2074

Original filed February 25, 1921. C. W. Higgison, Clerk.

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OPINION

2076 UNITED STATES DISTRICT COURT—NORTHERN DISTRICT OF NEW YORK.

LEHIGH VALLEY RAILROAD COMPANY,

Plaintiff,

against

2077 PUBLIC SERVICE COMMISSION, Second District of the State of New York, and CHARLES B. HILL, FRANK IRVINE, JOHN A. BARHITE, JOSEPH A. KELLOGG, and GEORGE R. VAN NAMEE, as Members of and Constituting the Public Service Commission, Second District of the State of New York, and LEDYARD P. HALE, Individually, and as Counsel to Said Public Service Commission, Second District of the State of New York,

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Defendants.

THE LEHIGH & HUDSON RIVER RAILWAY COMPANY,

Plaintiff,

2080 *against*

SAME DEFENDANTS.

New York, Ontario & Western Railway Company, *Plaintiff*, *against* Same Defendants.	2081
Erie Railroad Company, *Plaintiff*, *against* Same Defendants.	2082
New Jersey and New York Railroad Company, *Plaintiff*, *against* Same Defendants.	2083
Delaware, Lackawanna and Western Railroad Company, *Plaintiff*, *against* Same Defendants.	2084
The Delaware & Hudson Company, Greenwich & Johnsonville Ry. Co. and Schoharie Valley Ry. Co., *Plaintiffs*, *against* Same Defendants.	2085

2086 THE STATE OF NEW YORK and CHARLES D. NEWTON, Personally and as Attorney-General of the State of New York,

Plaintiffs,

against

2087 THE UNITED STATES and EDGAR E. CLARK, CHARLES C. MCCHORD, BALTHASAR H. MEYER, HENRY C. HALL, WINTHROP M. DANIELS, CLYDE B. ACHESON, ROBERT E. WOLLEY, JOSEPH B. EASTMAN, HENRY J. FORD and MARK W. POTTER, Constituting the Interstate Commerce Commission,

2088 *Defendants.*

Before

Hon. MARTIN T. MANTON,
Circuit Judge,

2089 Hon. GEORGE W. RAY, and
Hon. JOHN R. HAZEL,
District Judges,

holding the Court pursuant to section 256 of the Judicial Code.

2090 These several actions instituted by the railroad companies, are for an injunction seeking to restrain the Public Service Commission of the Second District of the State of New York, the Attorney-General of the State of New York, and counsel for the Public Service Commission for

the Second District, from commencing any suit or proceeding to enforce the provisions of the laws of the State of New York (chap. 48, 49 of the Consolidated Laws of 1910; section 57 of the Railroad Law; sections 24, 56, 57 of the Public Service Commission Laws) against said plaintiffs by reason of anything done or omitted to be done by the plaintiffs under the authority of an order of the Interstate Commerce Commission, or doing any act which would prevent or tend to prevent the plaintiffs or their agents from charging or collecting the intrastate rates, fares and charges established by the Interstate Commerce Commission in the State of New York. They seek an injunction pending the hearing and determination of the plaintiffs' application for an interlocutory injunction. 2091 2092 2093

The State of New York and the Attorney-General of the State seek an injunction restraining the Interstate Commerce Commission from enforcing an order made fixing said rates and charges and seek to have it determined that the order of the Interstate Commerce Commission is wholly null and void and unconstitutional and illegal, and ask for "writs of mandamus, certiorari and prohibition as warranted by the principles and usages of law." They seek to restrain the defendants, and their agents, from bringing any suit, action or prosecution against the railroads to compel the enforcement, operation and execution of the findings and orders of the Interstate Commerce Commission referred to, and 2094 2095

finally, they seek injunctive relief. Each of these applications is opposed.

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R. W. BARRETT, ESQ.,
Solicitors for Lehigh Valley R. Co.
H. D. NOBLE, JR., ESQ.,
JOHN J. BEATTIE, ESQ.,
Solicitors for Lehigh & Hudson River Ry. Co.
C. L. ANDRUS, ESQ.,
Solicitor for N. Y., O. & W. Ry. Co.
GEORGE F. BROWNELL,
Solicitor for Erie R. Co. and *N. J. & N. Y. R. Co.*
W. S. JENNEY, ESQ.,
Solicitor for D., L. & W. R. Co.
WALTER C. NOYES, ESQ.,
WILLIAM D. WALDRON, ESQ.,
Solicitors for The Delaware & Hudson Co., Greenwich & Johnsonville Ry. Co. and *Schoharie Valley Ry. Co.*
EDWARD G. GRIFFIN, ESQ.,
Deputy Attorney-General of New York.
Solicitor for The State of New York and Charles D. Newton, etc.
P. J. FARRELL, ESQ.,
Solicitor for Interstate Commerce Commission.
BLACKBURN ESTERLING, ESQ.,
Special Asst. Attorney-General for the United States.

Opinion

MANTON, Circuit Judge:

The question presented in these cases is whether the Transportation Act of 1920, section 13, in so far as it permits the Interstate Commerce Commission to fix the rates and fares for the intrastate traffic on interstate railroads in the State of New York, is constitutional. The act provides:

"Sec. 13 (3). Whenever in any investigation under the provisions of this Act, or in any investigation instituted upon petition of the carrier concerned which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this Act with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by itself of the co-operation, services, records, and facilities of such State authorities in the enforcement of any provision of this Act.

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(4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

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The Interstate Commerce Commission, pursuant to the provisions of this Act, was requested in a proper proceeding, to make findings as to an increase in freight rates and passage fares and baggage charges and rates for milk and cream within the region which includes the State of New York. It made findings for this region allowing an increase of forty per cent in the interstate freight rates, twenty per cent in interstate passenger fares, baggage charges and rates on milk and cream and also a surcharge amounting to fifty per cent of the charge for space in the sleeping and parlor cars to accrue to the rail car-

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riers. (Ex Parte 74 Increased Rates 1920, 58 I. C. C. R. 220.) Thereafter, the steam railroads within the State of New York made, pursuant to section 13, an application to the Public Service Commission of the State of New York, Second District, for permission to file, effective on five days' notice, tariff supplements providing increase in rates, fares and charges applicable to the intrastate tariff in the State of New York corresponding with those authorized by the Interstate Commerce Commission. The Public Service Commission allowed the same so far as the rates and charges for transportation of freight, except milk (Order of August 19, 1920) and the increase became effective August 26, 1920, contemporaneously with the increase in the interstate rate. However, so far as it related to passenger fares, sleeping car and parlor car fares, baggage charges and rates on milk and cream, the application was denied by the Public Service Commission. A petition for relief was thereafter filed by the steam railroads under the provisions of § 13 of the Interstate Commerce Act with the Interstate Commerce Commission. Upon the hearing of this petition, the Interstate Commerce Commission found that the refusal of the State of New York through the Public Service Commission to permit the carriers to increase the rates and fares here in controversy to the extent approved by the Interstate Commerce Commission is costing the railroads between eleven and twelve million dollars annually, so that the annual earnings of the Interstate carriers operating in New York are now between eleven and twelve million less

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2116 than they would be if the general lawful rates and freights approved by the Interstate Commerce Commission had become effective on intrastate traffic. Specifically, they find as to passenger fares, they are of an unduly preferential character and so far as the intrastate fares and charges now in effect in the State of New York

2117 are concerned, interstate passenger fares are in general upon a basis of 3.6 cents per mile per maximum. Passengers traveling between points in the State of New York and other states, may be required to pay 3.6 cents per mile, whereas passengers traveling within the State of New York pay only 3 cents per mile. The basis of 3.6

2118 cents applies on intrastate traffic in every state bordering on the State of New York, and intrastate passengers in New York enjoy a basis of fare distinctly lower than those exacted from interstate passengers in the same territory, often riding in the same trains, and also lower than fares paid by intrastate passengers in neighboring states. It is found that there are no trans-

2119 portation conditions in the State of New York that justify lower rates or fares on the whole than those applicable in neighboring states or lower than the interstate rates and fares between points in New York and points in other states. As illustrative of this, the Commission cites the

2120 case of the several available routes connecting New York City and Buffalo over the New York Central, while the others are interstate. It is pointed out that on August 26, 1920, the fare was $14.26 over the interstate routes and $13.60 over the New York Central, a difference of $1.11 in favor of the passenger using the latter route.

And in case the passenger occupies the lower Pullman berth, the difference is $2.36. A passenger traveling from New York city to a point west of Buffalo, can, by buying a ticket to Buffalo over the New York Central, and buying another ticket at Buffalo to destination, defeat the through interstate fare. This practice is found to be carried on to considerable extent with a tendency to disrupt the entire fabric of interstate passenger fares in the territory involved. Excess baggage charges are governed by the passenger fares and a discrimination in passenger fares necessarily involves a discrimination in excess baggage charges. Likewise, in the rates fixed for milk and cream — which includes skim milk, buttermilk, condensed milk, evaporated milk and pot cheese — it is shown to be discriminatory. It is pointed out that the New York Central Railroad operates nine milk trains daily to New York City district, carrying one million three hundred thousand quarts of milk and cream, of which approximately seventy-five per cent is shipped over intrastate routes and approximately twenty-five per cent over interstate routes. Nine or ten carloads of milk and cream per day originate on the Ulster & Delaware Railroad, which extends from Kingston, N. Y., northwest to Oneonta, one hundred and seven miles. The cars are delivered to the New York Central at Kingston, together with six or seven cars originating on a branch of the latter carrier, extending southwesterly from Kingston, and are then formed into a milk train which moves to New York over the tracks of the West Shore line. The route over the West Shore line extends into the State of New Jersey, the West

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2126 Shore terminals being at Weehawken, and is therefore an interstate route. Shipments of milk and cream also originate at points on the east side of the Hudson and in territory not far distant from that served by the Ulster & Delaware, and move to New York over the intrastate route of the New York Central along the east bank of
2127 the Hudson river. On shipments using the interstate route, the rate charges are twenty per cent higher than those over the intrastate, although there is no justification, from a transportation point, for a difference in the rates. Further, it is pointed out that a milk train is operated by the Delaware & Hudson Company from Eagle
2128 Bridge, New York, which is northwest of Troy, in a northerly direction, a distance of fifty-two miles, to Castleton, Vermont, thence southwesterly to Troy, New York, where it is delivered to the New York Central. Between Eagle Bridge and Castleton, this train crosses the state line three times, and again shortly after leaving Cas-
2129 tleton for Troy. All shipments received before the last crossing of the state line are interstate shipments and others intrastate shipments. On milk and cream in this train, which crosses the state line, charges must be made at interstate rates, which are in excess of the charges for intra-
2130 state rates. The shipment of milk and cream on the western Vermont border are, when shipped to the New York City district, in competition with the milk and cream shipped from eastern New York State, which would have an intrastate route of carriage. The Interstate Commerce Commission has found that interstate rates on this traffic were unreasonable and unduly prejudicial to

2131 shippers from nearby points and unduly preferential of shippers from distant points, and resulted in a scale of mileage rates in blocks of ten miles each from distances away from the New York district up to six hundred and thirty miles. Thus, uniformity was procured. (Milk and Cream Rates to New York City, 45 I. C. B. R. 412.) 2132 With this present difference of twenty per cent increase above intrastate rates, such uniformity of charge would no longer exist.

The question of commutation fares was presented to the Commission, but that was reserved for future consideration.

2133 The foregoing findings of the Interstate Commerce Commission are binding upon us, if the findings have any evidence to support them. An examination of the testimony taken by the Commission upon the hearing of the petition for relief satisfies us that there is evidence to support the claim advanced by the railroads.

2134 It was said in the Supreme Court, in *A. T. & Santa Fe R. Co.* v. *United States* (234 U. S. 94) where the Supreme Court has under consideration the question of restraint of the Interstate Commerce Commission in executing an order which required carriers to desist from exacting a charge for delivering and receiving a carload of freight to and from industries located upon spur tracks and side tracks within their respective switching 2135 limits in Los Angeles, when moving in interstate commerce:

> "But, laying the generalization on one side, it is plain that the question whether or not there is at any point an additional service in connection with industrial spur tracks upon

2136 which to base an extra charge, or whether there is merely a substituted service which is substantially a like service to that included in the line-haul rate and not received, is a question of fact to be determined according to the actual conditions of operation.

Such a question is manifestly one upon which it is the province of the Commission to pass.

2137 4. We must therefore take the findings of the Commission in the present case as to the character and manner of use of the industrial spurs in Los Angeles — that they constituted part of the carrier's terminals and that under the conditions there existing, the receipt and delivery of goods on these spurs was a like service as compared with the receipt and delivery of goods at team tracks and freight sheds — as conclusions of fact. Assuming that they were based upon evidence, they are not open to review." (Citing cases.)

2138 And in *Skinner & Eddy Corp.* v. *United States* (249 U. S. 557) it was said at page 562:

2139 "*First.* The defendants contend that the District Court did not have jurisdiction of the subject-matter of this suit; because orders entered in a fourth section proceeding cannot be assailed in the courts; at least, not until after a remedy has been sought under § 13 and § 15 of the Act to Regulate Commerce. This contention proceeds apparently upon a misapprehension of plaintiff's position. If plaintiff had sought relief against a rate or practice alleged to be unjust because unreasonably high or discriminatory, the remedy must have been sought primarily by proceedings before the Commission, (citing cases); and the finding thereon would have been conclusive, unless there was lack of substantial evidence, some irregularity in the

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proceedings, or some error in the application of rules of law, (citing cases). But plaintiff does not contend that 75 cents is an unreasonably high rate or that it is discriminatory or that there was mere error in the action of the Commission. The contention is that the Commission has exceeded its statutory powers; and that, hence, the order is void. In such a case the courts have jurisdiction of suits to enjoin the enforcement of an order, even if the plaintiff has not attempted to secure redress in a proceeding before the Commission."

And in *Seaboard Air Line Ry.* v. *United States* (U. S. Adv. Op. 1920–21, page 14) the Supreme Court said at page 16:

"We are of opinion that the Commission was correct in regarding the service in question as a like and contemporary service rendered under substantially similar circumstances and conditions, and amply sustained as matter of law in *Wight* v. *United States*, 167 U. S. 512, 42 L. ed. 258, 17 Sup. Ct. Rep. 822, and *Interstate Commerce Commission* v. *Alabama Midland R. Co.*, 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. Rep. 45. The principle established in these cases is that the statute aims to establish equality of rights among shippers for carriage under substantially similar circumstances and conditions, and that the exigencies of competition do not justify discrimination against shippers for substantially like services.

Moreover, the determination of questions of fact is by law imposed upon the Commission, a body created by statute for the consideration of this and like matters. The findings of fact by the Commission upon such questions can be disturbed by judicial decree

2146 only in cases where their action is arbitrary, or transcends the legitimate bounds of their authority. (Citing cases.) "

After the findings were made by the Interstate Commerce Commission and the orders issued, it was binding upon the railroad companies and each 2147 was obligated to charge and collect the rates there fixed. Pursuant to § 13 if, after hearing, the Commission should find that such intrastate rate of fare " causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce 2148 on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce," it shall then be the duty of the Commission to prescribe a rate or charge upon such intrastate commerce in order to remove such advantage, preference, prejudice or discrimination. Further than this, the rate having been fixed by reason of the terms of § 13, such rates, 2149 fares, and charges must be observed by the carriers affected thereby, the law of any state or the decision or order of any state to the contrary notwithstanding.

The railroad complainants have alleged by their complaints and affidavits that, notwithstanding the order of the Interstate Commerce Commission 2150 made after such findings, the State authorities are attempting to prevent the complainants from complying therewith, and are threatening prosecution because of compliance therewith by the complainants, and that thus irreparable damage will be done to them if the State authorities are not restrained.

If Congress had the power to legislate granting the authority to fix such intrastate rates so as to prevent undue or unreasonable advantage, prejudice or preference between persons and localities in intrastate commerce and interstate or foreign commerce on the other hand, thus avoiding undue and unjust discrimination, the facts found by the Commission warrant its order. That Congress had power to so legislate has been substantially decided by the Supreme Court. In the *Minnesota Rate Case* (230 U. S. 352) the Court said:

> "This reservation to the States manifestly is only of that authority which is consistent with and not opposed to the grant to Congress. There is no room in our scheme of government for the assertion of state power in hostility to the authorized exercise of Federal power. The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the Nation may deal with the internal concerns of the State, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere. (Citing cases.)
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> The grant in the Constitution of its own force, that is, without action by Congress,

2156 established the essential immunity of interstate commercial intercourse from the direct control of the States with respect to those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation should be prescribed by a single authority. It has repeatedly been declared by this court that 2157 as to those subjects which require a general system or uniformity of regulation the power of Congress is exclusive. In other matters, admitting of diversity of treatment according to the special requirements of local conditions, the States may act within their respective jurisdictions until Congress sees fit to act; and, when Congress does act, the exercise of its authority overrides all conflicting 2158 state legislation."

No local rule can nullify the lawful exercise of federal authority, and, after the Interstate Commerce Commission has made an order within its jurisdiction, there is no compulsion on the carrier to comply with any inconsistent local requirements. (*Houston E. & W. Texas Ry. Co.* v. 2159 *United States*, 234 U. S. 342.)

Where state and federal views conflict, the judgment of Congress and the agencies of the government lawfully established by the laws of Congress must control. Otherwise, " the nation could not prosper if interstate and foreign trade were governed by many masters." (*Houston E. & W. Texas Ry. Co.* v. *United States, supra.*) In 2160 the Houston case, where an order of the Interstate Commerce Commission was made to correct discrimination found to exist against specified localities, interstate carriers were ordered to desist from charging higher rates for transportation between certain specified interstate points than

between certain specified intrastate points. It was held to be within the power delegated by the Congress to the Commission that, so far as the carrier's interstate rates conform to what was found to be reasonable by the Commission, they were entitled to maintain them, and that they were free to comply with the order by so adjusting their intrastate rates, to which the order related, so as to remove the forbidden discrimination.

It is urged by the State of New York that if the interstate commerce order be permitted to prevail so far as it affects intrastate rates, the same would violate the tenth amendment of the United States Constitution, in that it would invade powers reserved to the states to regulate intrastate commerce and to create, on proper conditions, control and regulate corporations doing business in the State of New York. And it is further contended that Art. 1, § 8, Clause 3 of the Constitution is violated by permitting the order fixing the rates to stand because it assumes to regulate purely intrastate commerce and requires that the revenue for interstate commerce be collected from intrastate commerce. These contentions are all disposed of by the language of the Supreme Court in *Gulf, Colorado & S. F. R.* v. *Hefley* (158 U. S. 98), where Justice Brewer, writing the opinion, announced:

> "Clearly the state and national acts relate to the same subject-matter and prescribe different rules. By the state act the bill of lading is made controlling as to the rate collectible, and a failure to comply with that requirement exposes the delinquent carrier to its penalties, while the national statute ignores the bill of lading and makes the pub-

2166 lished tariff rate binding, and subjects the offender, both carrier and agent, to severe penalties. The carrier cannot obey one statute without sometimes exposing itself to the penalities prescribed by the other. Take the case before us: If, in disregard of the joint tariff established by the defendant and the St. Louis and San Francisco Railway Company and filed with the Interstate Commerce Commission, the latter company, as a matter of favoritism, has issued this bill of lading at a rate less than the tariff rate, both the defendant company and its agent would, by delivering the goods upon the receipt of only such reduced rate, subject themselves to the penalties of the national law, while, on the other hand, if the tariff rate was insisted upon, then the corporation would become liable for the damages named in the state act. In case of such a conflict the state law must yield. 'This Constitution, and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land.' Constitution, Art. VI Clause 2.

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Generally it may be said in respect to laws of this character that, though resting upon the police power of the State, they must yield whenever Congress, in the exercise of the powers granted to it, legislates upon the precise subject-matter, for that power, like all other reserve powers of the States, is subordinate to those in terms conferred by the Constitution upon the nation. 'No urgency for its use can authorize a State to exercise it in regard to a subject-matter which has been confinded exclusively to the discretion of Congress by the Constitution.' *Henderson* v. *New York*, 92 U. S. 256, 271. 'Definitions

of the police power must however, be taken, subject to the condition that the State cannot, in its exercise, for any purpose whatever, encroach upon the powers of the general government, or rights granted or secured by the supreme law of the land.' *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 661. ' While it may be a police power in the sense that all provisions for the health, comfort, and security of the citizens are police regulations, and an exercise of the police power, it has been said more than once in this court that, where such powers are so exercised as to come within the domain of Federal authority as defined by the Constitution, the latter must prevail.' *Morgan* v. *Louisiana*, 118 U. S. 455, 464."

The facts found by the Commission and upon which it based its order well illustrate the need for regulation o fthe intrastate rates by the Interstate Commerce Commission. Under the Transportation Act it was thought to enable the carriers to earn an aggregate annual net railway operating income equal, as nearly as may be, to 6 per cent upon the aggregate value of the railway property of such carriers held for and used in the service of transportation. To accomplish this, the Commission is required to modify, establish, or adjust rates for the carriers as a whole or as a whole in each of such rate groups or territories as the Commission shall from time to time designate. The carriers here are included in the Eastern. To permit the New York State law to prevail and the orders of the Public Service Commission of the State of New York to be enforced would create an unjust discrimination of rates between the intrastate rate for New York and the

2176 interstate rate, which, in turn, would cast a burden upon the interstate commerce of the railroads within this group, resulting in such a rise for maintenance of prices of rates and fares within the Eastern group, so as to make up the deficiency caused by the lower intrastate rates and
2177 fares, which the Commission finds is between eleven and twelve million dollars per year. This power was granted by the Congress to the Interstate Commerce Commission as a means of protection against commercial hostilities and reprisals between the various states. Therefore, the protection of the Interstate Commerce Com-
2178 mission was imperative for the railroads. More so than ever, since the federal control of railroads, the country has learned the lesson of the importance of linking the arms of transportation and commerce over the country. It has resulted in the states becoming dependent upon each other to obtain favorable transportation conditions. Uniformity of rates to make for the proper trans-
2179 portation facilities were essential to the success of the purposes sought to be affected by the terms of the Transportation Act. We recognize that Congress has no constitutional power to touch intrastate rates as such, and the Transportation Act of 1920 is intended only to protect interstate commerce. *It is because the rate fixed by the*
2180 *Railroad Law and the Public Service Commission of New York casts a direct burden upon the interstate commerce and is jeopardizing the power of the national carriers to maintain themselves on the basis which Congress declared they should be maintained under the Transportation Act of* 1920, *that this Court grants relief.*

Opinion

Ample reason exists here why this Court has jurisdiction and should prevent irreparable injury occurring to the railroads. Under § 59 of the Railroad Law of the State of New York, the complainants could be fined for charging more than that fixed by the Public Service Commission as a permissible fare or rate, and § 49 of the Public Service Commission Law empowers the Public Service Commission of the Second District to fix the rate which the railroads are obliged to observe. For failing to carry out the orders of the Public Service Commission when fixed, as to rate or fare, each offense constitutes a separate violation for which there is a penalty of five thousand dollars, and the offending railway may be convicted of a misdemeanor for which there is the penalty of imprisonment to the offending officer and a fine of five hundred dollars. From all of this it is obvious that there is danger, not only of injury and loss to the property of the railway companies because of their being subjected to the fines and penalties, but there is the threatened danger of multiplicity of suits. 2181 2182 2183 2184

The motion for injunctive relief of the several railroad company complainants will be granted, and the motion for injunctive relief of the Attorney-General and the State of New York will be denied. The motion of the United States and the Interstate Commerce Commission to dismiss the bill for want of equity will be granted. 2185

Orders may be presented accordingly; also final decree in the action instituted by the State of New York.

Endorsed. Filed Feb 22-1921- C. W. Higginson Clerk

Opinion - Denison; Geo. W. Ray. N. S. D. Judge. - I Concur John

FINAL DECREE.

2186 IN THE DISTRICT COURT OF THE UNITED STATES — NORTHERN DISTRICT OF NEW YORK.

2187 THE STATE OF NEW YORK and CHARLES D. NEWTON, Personally and as Attorney-General of the State of New York,

Plaintiffs,

against

2188 THE UNITED STATES OF AMERICA and EDGAR E. CLARK et al., Constituting the Interstate Commerce Commission,

Defendants,

2189 THE DELAWARE & HUDSON COMPANY, ERIE RAILROAD COMPANY, THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, and Certain Other Railroad Companies,

Intervenors.

In Equity No. 295.

Before

Hon. MARTIN MANTON,
Circuit Judge, Presiding,
Hon. GEORGE W. RAY, and
2190 Hon. JOHN R. HAZEL,
District Judges.

This cause came on to be heard at this Term and was argued by counsel; and thereupon, upon consideration thereof, it was

Ordered, adjudged and decreed, as follows, viz.:

Final Decree.

1. That the motion of the plaintiffs for a preliminary injunction be and the same is hereby denied. 2191

2. That the motion of the United States and the motion of the Interstate Commerce Commission to dismiss the petition are, and each of them is, hereby sustained, and that the petition be and the same is hereby dismissed for want of equity at the cost of the plaintiffs. 2192

By the Court:

MARTIN T. MANTON,
Circuit Judge, Presiding.
GEORGE W. RAY,
JOHN R. HAZEL,
District Judges. 2193

Filed Mar. 1 - 1921 - C W Hoffman clerk

And afterwards, to wit, on the 4th day of March, 1921, there was duly filed in said Court a petition for appeal in words and figures, as follows, to wit:

112 2194

2195

PETITION ON APPEAL.

2196 IN THE UNITED STATES DISTRICT COURT—FOR THE NORTHERN DISTRICT OF NEW YORK.

2197 THE STATE OF NEW YORK and CHARLES D. NEWTON, Personally and as Attorney-General of the State of New York,

Plaintiffs,

against

2198 THE UNITED STATES and EDGAR E. CLARK, CHARLES C. MCCHORD, BALTHASAR H. MEYER, HENRY C. HALL, WINTHROP M. DANIELS, CLYDE B. ACHESON, ROBERT E. WOLLEY, JOSEPH B. EASTMAN, HENRY J. FORD and MARK W. POTTER, Constituting the Interstate Commerce Commission, and Nine Railroads Intervening,

Defendants.

2199 In Equity No. 295.

2200 The State of New York and Charles D. Newton personally and as Attorney-General of the State of New York, the above-named petitioners, feeling themselves aggrieved by the final order or decree of the District Court, entered March —, 1921, adjudging that the petition does not state any cause of action against the defendants or any of them and dismissing this cause and allowing costs against the petitioners to the defendants and refusing the relief demanded in plaintiffs' petition and bill of complaint herein,

by their counsel prays and appeals to the Supreme Court of the United States from said final order and decree.

The particulars wherein the petitioners consider said final order or decree erroneous are set forth in the assignment of errors now on file in this Court and to which reference is made.

And the petitioners further pray that transcript of the record, proceedings and papers on which said final order or decree was made and entered, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States, and the petitioners further pray that citation issue as provided by law and that the proper order touching security to be required of them to perfect their appeal be made.

CHARLES D. NEWTON,
Attorney-General of the State of New York.
Solicitor in person for plaintiffs herein.

EDWARD G. GRIFFIN and
GEORGE L. MEADE,
Deputies Attorney-General of the State of New York,
Of Counsel.

Filed this 4th day of March, 1921.

CHARLES W. HIGGINSON,
Clerk of the District Court for the Northern District of New York.

And afterwards, to wit, on the 4th day of March, 1921, the same being a judicial day of the regular March, 1921, term of said Court.

Order Allowing Appeal.

2206 Present: The Hon. Martin T. Manton, Circuit Judge, and George W. Ray and John R. Hazel, District Judges.

The following proceedings were had in said cause, to wit:

ORDER ALLOWING APPEAL.

2207 IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK.

2208 THE STATE OF NEW YORK and CHARLES D. NEWTON, Personally and as Attorney-General of the State of New York,
Plaintiffs,
against
THE UNITED STATES and EDGAR E. CLARK, CHARLES C. MCCHORD, BALTHASAR H. MEYER, HENRY C. HALL, WINTHROP M. DANIELS, 2209 CLYDE B. ACHESON, ROBERT E. WOLLEY, JOSEPH B. EASTMAN, HENRY J. FORD and MARK W. POTTER, Constituting the Interstate Commerce Commission, and Nine Railroads Intervening,
Defendants.
2210 } In Equity. No. 295.

In the above entitled cause the petitioners having made and filed their petition praying an appeal to the Supreme Court of the United States from the final order or decree of the District Court, entered March , 1921, and also having

made and filed an assignment of errors, and having conformed in all respects to the statutes and rules of Court in such cases made and provided, 2211

It is ordered and decreed that the appeal be and the same hereby is allowed as prayed and made returnable on the 1st day of April, 1921, and the clerk is directed to transmit forthwith a properly authenticated transcript of the record, papers and proceedings to the Supreme Court of the United States. 2212

MARTIN T. MANTON,
United States Circuit Judge for the Southern District of New York.

JOHN R. HAZEL, 2213
United States District Judge Northern District of New York.

GEORGE W. RAY,
United States District Judge Western District of New York. 2214

Filed this 4th day of March, 1921.

CHARLES W. HIGGINSON,
Clerk of the District Court for the Northern District of New York.

And afterwards, to wit, on the 4th day of March, 1921, there was filed in said Court a citation on appeal, which with the acceptances of service endorsed thereon and the acceptances of service filed on the ~~15th~~ day of March, 1921, is in words and figures as follows, to wit: 2215

CITATION ON APPEAL.

2216 IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK.

2217 THE STATE OF NEW YORK and CHARLES D. NEWTON, Personally and as Attorney-General of the State of New York,

Plaintiffs,

against

2218 THE UNITED STATES and EDGAR E. CLARK, CHARLES C. MCCHORD, BALTHASAR H. MEYER, HENRY C. HALL, WINTHROP M. DANIELS, CLYDE B. ACHESON, ROBERT E. WOLLEY, JOSEPH B. EASTMAN, HENRY J. FORE and MARK W. POTTER, Constituting the Interstate Commerce Commission,

2219 THE DELAWARE AND HUDSON RAILROAD COMPANY, GREENWICH AND JOHNSVILLE RAILWAY COMPANY, SCHOHARIE VALLEY RAILWAY COMPANY, THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, NEW JERSEY AND NEW YORK RAILROAD COMPANY,

2220 ERIE RAILROAD COMPANY, NEW YORK, ONTARIO AND WESTERN RAILROAD COMPANY, LEHIGH AND HUDSON RIVER RAILWAY COMPANY, LEHIGH VALLEY RAILROAD COMPANY,

Defendants.

In Equity. No. 295.

Citation on Appeal.

UNITED STATES OF AMERICA, *SS:* 2221

The President of the United States to the United States of America and Edgar E. Clark, Charles C. McChord, Balthasar H. Meyer, Henry C. Hall, Winthrop M. Daniels, Clyde B. Acheson, Robert E. Wolley, Joseph B. Eastman, Henry J. Ford, and Mark W. Potter constituting the Interstate Commerce Commission, The Delaware and 2222
Hudson Railroad Company, Greenwich and Johnsville Railway Company, Schoharie Valley Railway Company, the Delaware, Lackawanna and Western Railroad Company, New Jersey and New York Railroad Company, Erie Railroad Company, New York, Ontario and Western Railroad 2223
Company, Lehigh and Hudson River Railway Company, Lehigh Valley Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within thirty days from the date hereof pursuant to an appeal duly allowed and filed in the Clerk's office of the United States, 2224
District Court for the Northern District of New York wherein the State of New York and Charles D. Newton, personally and as Attorney-General of the State of New York are appellants and you are appellees, to show cause, if any there be, why the final order or decree rendered against said appellants in said appeal should not be reversed 2225
and set aside, and an order or decree of the United States Supreme Court should not be made granting the relief asked for in the petition and bill of complaint herein.

Citation on Appeal.

2226 Witness the Honorable Martin T. Manton, United States Circuit Judge and Honorable George W. Ray and the Honorable John R. Hazel, United States District Judges.

Dated: 28 February
This ~~4th~~ day of ~~March~~, 1921.

2227 MARTIN T. MANTON,
United States Circuit Judge.
JOHN R. HAZEL,
United States District Judge.
GEORGE W. RAY,
United States District Judge.

2228 Service of the within citation on appeal and receipt of a copy is hereby admitted this 15th day of March, 1921.

BLACKBURN ESTERLINE,
For the United States.
P. J. FARRELL,
For the Interstate Commerce Commission.

2229 WALTER C. NOYES,
WILLIAM D. WALDRON,
R. W. BARRETT,
H. D. NOBLE, Jr.,
C. L. ANDRUS,
JOHN J. BEATTIE,
W. S. JENNEY,
GEORGE F. BROWNELL,
2230 *Solicitors for all intervening Railroad Companies.*

Filed Mar 4-1921- C. W. Heiggmon Clerk

And afterwards, to wit, on the 18th day of March, 1921, there was duly filed in said Court an Assignment of Errors, in words and figures as follows, to wit:

ASSIGNMENT OF ERRORS.

2231 IN THE UNITED STATES DISTRICT COURT—FOR THE NORTHERN DISTRICT OF NEW YORK.

THE STATE OF NEW YORK and CHARLES D. NEWTON, Personally and as Attorney-General of the State of New York, *Plaintiffs,* *against* THE UNITED STATES and EDGAR E. CLARK, CHARLES C. MCCHORD, BALTHASER H. MEYER, HENRY C. HALL, WINTHROP M. DANIELS, CLYDE B. ACHESON, ROBERT E. WOLLEY, JOSEPH B. EASTMAN, HENRY J. FORD and MARK W. POTTER, Constituting the Interstate Commerce Commission, and nine Railroads Intervening, *Defendants.*	In Equity No. 295.

2232 2233 2234

Come now the petitioners the State of New York and Charles D. Newton, personally, and as Attorney-General of the State of New York, and by their solicitors, and in connection with their petition for appeal file the following assignment of errors on which they will rely upon said appeal to the Supreme Court of the United States from the final order or decree of the District Court entered ~~February 21~~, 1921, in the above-entitled cause. 2235

The District Court erred:

2236

I.

In denying by its order of February 21, 1921, the application of the petitioner for an interlocutory injunction during the pendency of this suit against the defendant the United States and the Interstate Commerce Commission and each of

2237 them, restraining the enforcement, operation and execution of and setting aside in whole the report, findings and order made and entered by the Interstate Commerce Commission, a copy of which was attached to the bill of complaint herein and marked Paper 5, and restraining said defendants, their officers, employees, agents and servants and successors in office and each of them

2238 from doing anything or beginning any suit, action or prosecution against the railroads joined in said order or the plaintiffs to compel the enforcement, operation and execution of said order or interfering with the enforcement of the laws and Constitution of the State of New York.

II.

2239 In refusing to hold that the report, findings and order so marked Paper 5 above referred to the Interstate Commerce Commission was illegal, unconstitutional and void and of no effect, and that there were no facts before the Interstate Commerce Commission justifying its report, findings and order and that the record wholly

2240 lacks any foundation for the making of such report, findings and order.

III.

In refusing to hold that the report, findings and order of the Interstate Commerce Commission

were made in defiance and disregard of the procedure and requirements of the statutes of the United States and without the full and fair hearing provided for therein. 2241

IV.

In refusing to hold that the report, findings and order of the Interstate Commerce Commission were indefinite, uncertain, ambiguous and discriminatory, without just grounds as between classes of common carriers. 2242

V.

In refusing to hold that no statute of the United States authorized the report, findings and order of the Interstate Commerce Commission. 2243

VI.

In refusing to hold that the report, findings and order of the Interstate Commerce Commission and the statutes of the United States under which they pretended to act violate the Tenth Amendment of the United States Constitution in that they invade powers reserved to the State of New York to regulate intrastate commerce and to create on proper conditions, control and regulate corporations doing business in the State of New York. 2244

VII. 2245

In refusing to hold that the report, findings and order of the Interstate Commerce Commission and the statutes of the United States under which they pretended to act violate the Fifth Amendment of the United States Constitution by

2246 taking property of all the complainants without due process of law in that they impair the obligation of the contract existing between the State of New York and the New York Central Railroad Company as set forth in the petition and bill of complaint herein.

VIII.

2247 In refusing to hold that the report, findings and order of the Interstate Commerce Commission and the statutes of the United States under which they pretended to act violate article 1, section 9, clause 4 of the United States Constitution in that they impose a capitation and direct tax without
2248 the apportionment required.

IX.

In refusing to hold that the report, findings and order of the Interstate Commerce Commission and the statutes of the United States under which they pretended to act violate article 1, section 8,
2249 clause 3 of the United States Constitution in that they assume to regulate purely intrastate commerce and require that revenue for interstate commerce be collected for intrastate commerce.

X.

In refusing to hold that the report, findings and
2250 order of the Interstate Commerce Commission and the statutes of the United States under which they pretended to act violate article 1, section 5, clause 9 of the United States Constitution in that they prefer ports of other states to the ports of the State of New York.

2251

XI.

In refusing to hold that the Interstate Commerce Commission threatens to sue the steam railroads joined in its orders for penalties amounting to millions of dollars if said railroads engaged in intrastate commerce within the State violate said report, findings or order of the Interstate Commerce Commission or any part thereof.

2252

XII.

In holding that said orders of the Interstate Commerce Commission were within its jurisdiction and authority.

2253

XIII.

In ordering, adjudging and decreeing that the petition herein does not state any cause of action against said defendants or any of them.

XIV.

2254

In ordering, adjudging and decreeing that this cause of action be and the same is hereby dismissed.

XV.

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In not granting the prayer of the petitioners for an interlocutory injunction against the defendants in the respects specified and on the grounds set forth in the petition and bill of complaint herein.

XVI.

In not adjudging that the petition and bill of complaint herein state a good cause of action or suit against the defendants.

2256

XVII.

In not denying the motions of the defendants to dismiss the petition and bill of complaint herein.

XVIII.

2257 In not adjudging that the petitioners by their petition and bill of complaint showed themselves entitled to relief prayed for therein as against the motions made to dismiss by the defendants.

XIX.

2258 In entering a final order or decree in this cause against the petitioners and in favor of the defendants.

XX.

In not granting the petitioners the relief prayed for by them in the petition and bill of complaint herein.

2259

XXI.

In entering an order or decree in this cause granting to the defendants their costs and disbursements against the petitioners herein.

WHEREFORE, the petitioners pray that said final order or decree of the District Court entered February 21, 1921, be reversed, annuled and set

2260 aside and that the District Court be instructed to enter such decree as is prayed for by the petition and bill of complaint herein and that such other

and further order be made as may be appropriate. 2261

Dated at Albany N. Y. this 26 day of Febru

CHARLES D. NEWTON,
Attorney-General of the State of New York.
Solicitor in person for plaintiffs herein. 2262

EDWARD G. GRIFFIN and
~~GEORGE L. MEADE,~~
Deputies Attorney General of the State of New York,
Of Counsel.

Office for office address Capitol, Albany N. Y.

Filed this 4th day of March, 1921.

CHARLES W. HIGGINSON,
Clerk of the District Court for the Northern District of New York. 2263

And afterwards, to wit, on the 18th day of March, 1921, there was duly filed ~~in said Court~~ a praecipe for transcript of record on appeal in words and figures as follows, to wit: 2264

2265

PRAECIPE FOR TRANSCRIPT OF RECORD ON APPEAL.

2266 IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK.

2267 THE STATE OF NEW YORK and CHARLES D. NEWTON, Personally and as Attorney-General of the State of New York,

Plaintiffs,

against

2268 THE UNITED STATES and EDGAR E. CLARK, CHARLES C. MCCHORD, BALTHASER H. MEYER, HENRY C. HALL, WINTHROP M. DANIELS, CLYDE B. ACHESON, ROBERT E. WOLLEY, JOSEPH B. EASTMAN, HENRY J. FORD and MARK W. POTTER, Constituting the Interstate Commerce Commission, and Nine Railroads Intervening,

Defendants.

2269

In Equity No. 295.

To The Honorable CHARLES W. HIGGINSON, *Clerk of the United States District Court, Northern District of New York.*

2270 You will please prepare and certify a transcript of the entire record of the proceedings in the above entitled cause, to be filed in the office of the Clerk of the Supreme Court of the United States on the appeal from the final order or decree of the

District Court, entered on the 1st day of March, 1921, and include in said transcript in the order given below, the following pleadings (proceedings,) papers and orders on file or of record and the endorsements thereon, showing acceptance of service, dates of filing, etcetera, to wit: 2271

1. Petition and bill of complaint and order to show cause with the returns of service thereof on the defendants. 2272

2. Answer of the United States.

3. Answer of the Interstate Commerce Commission.

4. The report of the Interstate Commerce Commission known as Ex Parte 74, offered in evidence by Blackburn Esterline, representing the United States. 2273

5. The opinion of the Public Service Commission of the State of New York, Second District, decided August 19, 1920, Case No. 526, offered in evidence by Mr. Esterline.

6. Certificate of the Secretary of the Interstate Commerce Commission and minutes in relation to Ex Parte 74, offered by P. J. Farrell, Counsel for the Interstate Commerce Commission, which offer appears at page 34 of the minutes. 2274

7. The order of the Public Service Commission of the State of New York, Second District, offered by Mr. Esterline, at page 35 of the stenographer's minutes, in connection with the opinion of said Commission in No. 526, which was to be supplied by Deputy Attorney-General Griffin. 2275

8. The several petitions for intervention of the

2276 Delaware & Hudson Company and the other Railroad Companies presented by Mr. Walter C. Noyes, on behalf of said companies, the order allowing them and each of them, and the further statement of Mr. Noyes and the order of the Court thereon with respect to the adoption by the several Railroad Companies, the answer filed by
2277 the Interstate Commerce Commission.

9. The opinion written by Circuit Judge Manton, the final order and decree entered March 1, 1921, and all orders, papers, journal entries and other memoranda relative to the record and proceedings in said cause.

10. Assignment of Errors.

2278 11. Petition for Appeal.

12. Order Allowing Appeal.

13. Citation on Appeal.

14. Acceptance of Service of Citation on Appeal for Defendants.

15. Praecipe.

2279 16. Bond.

EDWARD G. GRIFFIN,
Deputy Attorney-General of the State of New York,
Solicitor for Plaintiffs,
Office and Post-office Address,
Capitol, Albany, N. Y.

2280 Dated at Albany, N. Y., this 16th day of March, 1921.

For the purpose of preparing and completing the transcript of record for the hearing of the

appeal, the foregoing praecipe for record is agreed to. 2281

March 16, 1921.

BLACKBURN ESTERLINE,
Special Assistant to the Attorney-General for the United States. 2282

P. J. FARRELL,
Solicitor for Edgar E. Clark et al., constituting the Interstate Commerce Commission.

WALTER C. NOYES,
WILLIAM D. WALDRON,
R. W. BARRETT,
H. D. NOBLE, JR.,
C. L. ANDRUS,
JOHN J. BEATTIE,
W. S. JENNEY,
GEORGE F. BROWNELL,
Solicitors for all Intervening Railroad Companies. 2283 2284

Filed Mar. 18 1921 - C. W. Heggem Clerk

And afterwards, to wit, on the 4th day of March, 1921, there was duly filed in said court a bond on appeal in words and figures as follows, to wit: 2285

BOND ON APPEAL.

2286 IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK.

2287 THE STATE OF NEW YORK and CHARLES D. NEWTON, Personally and as Attorney-General of the State of New York,

Plaintiffs,

against

2288 THE UNITED STATES and EDGAR E. CLARK, CHARLES C. MCCHORD, BALTHASAR H. MEYER, HENRY C. HALL, WINTHROP M. DANIELS, CLYDE B. ACHESON, ROBERT E. WOLLEY, JOSEPH B. EASTMAN, HENRY J. FORD and MARK W. POTTER, Constituting the Interstate Commerce Commission, and Nine Railroads Intervening,

2289 *Defendants.*

In Equity. No. 295.

Know all men by these presents, That we The State of New York and Charles D. Newton as Attorney-General of the State of New York, as principal, and The National Surety Company of New York, as surety, are held and firmly bound 2290 unto the above named The United States and Edgar E. Clark, Charles C. McChord, Balthasar H. Meyer, Henry C. Hall, Winthrop M. Daniels, Clyde B. Acheson, Robert E. Wolley, Joseph B.

Eastman, Henry J. Ford and Mark W. Potter, Constituting The Interstate Commerce Commission, for the payment of which well and truly to be made we bind ourselves and each of us, our successors and assigns, jointly and severally firmly by these presents. Sealed with our seals and dated the 28th day of February, 1921. Whereas we the above named The State of New York and Charles D. Newton as Attorney-General of the State of New York, have prosecuted an appeal to the Supreme Court of the United States to reverse the final order or decree rendered in the above entitled suit denying plaintiff's prayer for relief herein.

Now, therefore, the condition of this obligation is such that if the above named The State of New York and Charles D. Newton, as Attorney-General of the State of New York, shall prosecute said appeal to effect and answer all costs, if they fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

STATE OF NEW YORK,
By THOS. F. FENNELL,
Acting Attorney-General of the State of New York.

NATIONAL SURETY CO.
JAMES L. NOONAN,
Attorney in Tact.

Signed, sealed and delivered in the presence of us as witnesses as to the State of New York and Thomas F. Fennell, acting Attorney-General:

GEO. L. MEADE,
M. C. MUNSON.

Bond on Appeal.

2296 As to the National Surety Company of New York:
GEO. L. MEADE,
HARRY J. MAUG.

The foregoing bond is hereby approved this 1st day of March, 1921.

MARTIN T. MANTON,
United States Circuit Judge.

2297 GEORGE W. RAY,
United States District Judge for the Northern District of New York.
JOHN R. HAZEL,
United States District Judge for the Western District of New York.

Filed, this 4th day of March, 1921.

2298 CHARLES W. HIGGISON,
Clerk.

Then follows formal execution of bond by National Surety Co. power of attorney and financial statement.

CLERK'S CERTIFICATE

2299 UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF NEW YORK,
DISTRICT COURT CLERK'S OFFICE, } *ss.:*

I, Charles W. Higginson, Clerk of the District Court of the United States, for the Northern District of New York, do hereby certify that the foregoing pages, numbered from 1 to 467, inclusive, 2300 contain a true and correct transcript of the record and proceedings had in said Court in the case of the State of New York and Charles D. Newton, personally and as Attorney-General of the State of New York v. The United States and Edward E. Clark and others, constituting the Interstate

Clerk's Certificate.

Commerce Commission, impleded with others, as the same remain of record and on file in my said office or as the same have been stipulated by the attorneys for the respective parties and pursuant to the praecipe filed by the plaintiff-appellant.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at the city of Utica, in said District, on the 31st day of March, one thousand nine hundred twenty-one and of the Independence of the United States the one hundred and forty-fifth.

[SEAL]

CHAS. W. HIGGINSON,
Clerk.

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Office Supreme Court, U.
FILED
APR 11 1921
JAMES D. MAHER
CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 283 IN EQUITY.

THE STATE OF NEW YORK AND CHARLES D. NEWTON, PERSONALLY AND AS ATTORNEY GENERAL OF THE STATE OF NEW YORK, *Appellants*,

v.

THE UNITED STATES AND EDGAR E. CLARK, CHARLES C. MCCHORD, BALTHASAR H. MEYER, HENRY C. HALL, WINTHROP M. DANIELS, CLYDE B. ACHESON, ROBERT E. WOLLEY, JOSEPH B. EASTMAN, HENRY J. FORD AND MARK W. POTTER, CONSTITUTING THE INTERSTATE COMMERCE COMMISSION AND (INTERVENING) LEHIGH VALLEY RAILROAD COMPANY; THE LEHIGH & HUDSON RIVER RAILROAD COMPANY; NEW YORK, ONTARIO AND WESTERN RAILWAY COMPANY; ERIE RAILROAD COMPANY; NEW JERSEY AND NEW YORK RAILROAD COMPANY; DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY; THE DELAWARE & HUDSON COMPANY; GREENWICH & JOHNSONVILLE RAILWAY COMPANY AND SCHOHARIE VALLEY RAILWAY COMPANY, *Appellees*.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

MOTION ON BEHALF OF THE APPELLANTS TO ADVANCE.

CHARLES D. NEWTON,
Attorney General of New York.
EDWARD G. GRIFFIN,
GEORGE L. MEADE,
Deputies Attorney General.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

549
No. 295 — IN EQUITY.

THE STATE OF NEW YORK AND CHARLES D. NEWTON, PERSONALLY AND AS ATTORNEY GENERAL OF THE STATE OF NEW YORK, *Appellants,*

v.

THE UNITED STATES AND EDGAR E. CLARK, CHARLES C. MCCHORD, BALTHASAR H. MEYER, HENRY C. HALL, WINTHROP M. DANIELS, CLYDE B. ACHESON, ROBERT E. WOLLEY, JOSEPH B. EASTMAN, HENRY J. FORD AND MARK W. POTTER, CONSTITUTING THE INTERSTATE COMMERCE COMMISSION AND (INTERVENING) LEHIGH VALLEY RAILROAD COMPANY; THE LEHIGH & HUDSON RIVER RAILROAD COMPANY; NEW YORK, ONTARIO AND WESTERN RAILWAY COMPANY; ERIE RAILROAD COMPANY; NEW JERSEY AND NEW YORK RAILROAD COMPANY; DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY; THE DELAWARE & HUDSON COMPANY; GREENWICH & JOHNSONVILLE RAILWAY COMPANY AND SCHOHARIE VALLEY RAILWAY COMPANY,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

Motion to Advance.

Comes now the Attorney General of New York on behalf of the above named appellants and respectfully moves this Honorable Court to advance this cause and set it for a hearing at an early date.

This is a cause where the State of New York is a party plaintiff and is a cause within the scope of section 949 of the Revised Statutes; this motion is made after the cause has been docketed with the Clerk of the Court.

There is reason why the cause should be advanced upon the calendar, as follows.

The Railroad Commission of Wisconsin et al. v. *Chicago, Burlington & Quincy Railroad Company,* No. 694, in Equity, was argued here on March 11, 14 and 15, 1921. That case involved generally the power of the Interstate Commerce Commission to raise intrastate fares to the level of interstate fares upon trunk line carriers doing a comparatively large interstate business.

The New York case, above entitled, presents questions of wider and different scope in the following particulars.

1. As to effect of a charter contract which fixed a state fare as a condition precedent to corporate creation at a time before the carrier was linked into interstate service.

2. As to the power of the Interstate Commerce Commission over state carriers situated wholly within a state and doing a negligible interstate business.

3. As to the power of the Interstate Commerce Commission over electric interurban lines competing with trunk line interstate carriers.

4. As to the power of the Interstate Commerce Commission over carriers doing a suburban business.

5. As to the power of the Interstate Commerce Commission to increase a state fare where the fare set aside has been found by state authority to be actually profitable contemporaneously with the order of the Interstate Commerce Commission.

6. The New York case is a direct review of the order of the Interstate Commerce Commission as such review is authorized by the statute known as The District Court Jurisdiction Act. The action of the Commission as it affects every one of the 67 steam railroads doing business in New York is thus directly attacked and the vice of collateral review is avoided.

7. The volume of intrastate business affected by the order of the Interstate Commerce Commission in New York is greater than that affected by any other order in any other state.

Even though the court determines that the formulation of the general principles decisive of the Wisconsin case does not require extended consideration of the particular questions arising in New York and that a prior determination of the Wisconsin case will not prejudice our appeal, still, we respectfully submit, that taking into consideration comparatively the amount in controversy and the population affected,

the public interest will be served by extending a like privilege of advancement to the New York case.

If this motion is granted, the appellants will request three hours for argument.

April, 1921.

Respectfully submitted,

CHARLES D. NEWTON,
Attorney-General of New York.

EDWARD G. GRIFFIN,
GEORGE L. MEADE,
Deputies Attorney-General.

CERTIFICATE OF SERVICE OF MOTION.

I, Edward G. Griffin, one of the counsel for the appellants in the above motion, hereby certify that on the first day of April, 1921, on behalf of said appellants, I caused to be delivered at the addresses as heretofore entered upon the record of all the solicitors of the appellees above named, properly addressed respectively, notices in form as follows:

SUPREME COURT OF THE UNITED STATES

October Term, 1920.

No. ~~295~~ 849 — In Equity.

The State of New York and Charles D. Newton, Personally and as Attorney General of New York, *Appellants,*

v.

The United States and Edgar E. Clark, Charles C. McChord, Balthasar H. Meyer, Henry C. Hall, Winthrop M. Daniels, Clyde B. Acheson, Robert E. Wolley, Joseph B. Eastman, Henry J. Ford and Mark W. Potter, Constituting The Interstate Commerce Commission and (Intervening) Lehigh Valley Railroad Company; The Lehigh & Hudson River Railroad Company; New York, Ontario and Western Railway Company; Erie Railroad Company; New Jersey and New York Railroad Company; Delaware, Lackawanna and Western Railroad Company; The Delaware & Hudson Company; Greenwich & Johnsonville Railway Company and Schoharie Valley Railway Company,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

NOTICE OF MOTION.

In the above entitled proceeding the parties will please take notice that on the eleventh day of April, 1921, upon the coming in of the court, upon behalf of the appellants and upon the foregoing papers I shall move that the above entitled appeal shall be advanced and set for a hearing at any early date.

Dated, Albany, N. Y., March 28, 1921.

EDWARD G. GRIFFIN,
Deputy Attorney-General of New York.

FILED
OCT 3 1921
JAMES D. MAHER,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920

No. 283

THE STATE OF NEW YORK AND CHARLES D. NEWTON, PERSONALLY AND AS ATTORNEY-GENERAL OF THE STATE OF NEW YORK,

Appellants,

against

THE UNITED STATES AND EDGAR E. CLARK, CHARLES C. McCHORD, BALTHASAR H. MEYER, HENRY C. HALL, WINTHROP M. DANIELS, CLYDE B. ACHESON, ROBERT E. WOLLEY, JOSEPH B. EASTMAN, HENRY J. FORD AND MARK W. POTTER, CONSTITUTING THE INTERSTATE COMMERCE COMMISSION AND (INTERVENING) LEHIGH VALLEY RAILROAD COMPANY; THE LEHIGH & HUDSON RIVER RAILROAD COMPANY; NEW YORK, ONTARIO AND WESTERN RAILWAY COMPANY; ERIE RAILROAD COMPANY; NEW JERSEY AND NEW YORK RAILROAD COMPANY; DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY; THE DELAWARE & HUDSON COMPANY; GREENWICH & JOHNSONVILLE RAILWAY COMPANY AND SCHOHARIE VALLEY RAILWAY COMPANY,

Appellees.

APPEAL FROM UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANTS

CHARLES D. NEWTON,
Attorney-General of New York,

EDWARD G. GRIFFIN,
GEORGE L. MEADE,
Deputies Attorney General.

October 1, 1921

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No. 849

THE STATE OF NEW YORK AND CHARLES D. NEWTON, personally and as Attorney-General of the State of New York,

Appellants,

against

THE UNITED STATES AND EDGAR E. CLARK, CHARLES C. MCCHORD, BALTHASAR H. MEYER, HENRY C. HALL, WINTHROP M. DANIELS, CLYDE B. ACHESON, ROBERT E. WOLLEY, JOSEPH B. EASTMAN, HENRY J. FORD and MARK W. POTTER, constituting THE INTERSTATE COMMERCE COMMISSION and (intervening) LEHIGH VALLEY RAILROAD COMPANY; THE LEHIGH & HUDSON RIVER RAILROAD COMPANY; NEW YORK, ONTARIO AND WESTERN RAILWAY COMPANY; ERIE RAILROAD COMPANY; NEW JERSEY AND NEW YORK RAILROAD COMPANY; DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY; THE DELAWARE & HUDSON COMPANY; GREENWICH & JOHNSONVILLE RAILWAY COMPANY and SCHOHARIE VALLEY RAILWAY COMPANY,

Appellees.

Brief for appellants

STATEMENT

This is a direct appeal from a final decree of the United States Court for the Northern District of New York denying our application for an interlocutory injunction.

The application was made below and the appeal comes here under the special statutory practice governing the review of orders of the Interstate Commerce Commission (District Court Jurisdiction Act being part of the Urgent Deficiency Appropriation's Act of October 22, 1913; 38 Stat. L. 219; United States Compiled Statutes, § 998).

The Pleadings

The State of New York and Charles D. Newton personally as representative of a class and as Attorney-General of New York, bring suit against the United States and the officers constituting the Interstate Commerce Commission, setting forth as jurisdictional grounds: (a) the District Court Jurisdiction Act and the residence of the defendants (pp. 4–5); (b) a case arising under the Constitution and Laws of the United States involving more than $3,000 and to which the United States is a party (p. 5); (c) the joinder of the State of New York as a party in the proceeding before the Interstate Commerce Commission (p. 9); (d) the expenditure by the State of more than $365,000 annually for transportation of its officers and employees over the roads affected; (p. 10); (e) the plaintiff Newton is a citizen and taxpayer using the roads affected and represents a class too numerous to be joined (p. 20); (f) the plaintiff Newton as Attorney-General of New York is

particularly charged with the duty of protecting its interests and the rights of its people (p. 21); (g) the proceeding before the Interstate Commerce Commission arose in the Northern District of New York (p. 17);

The allegations of the complaint all being made upon knowledge, it was unnecessary to supply supporting affidavits. The allegations of fact in the complaint may be condensed as follows:

When the President took over the roads on December 28, 1917, the railroads had been charging in state commerce the rates provided under the laws of New York and continued to do so until May 28, 1918, when the Director-General increased the rates (pp. 5–6). Upon March 1, 1920, the federal control was relinquished to take final effect upon September 1, 1920. On July 29, 1920, the Interstate Commerce Commission increased interstate freight and passenger rates (p. 7). Afterwards the Public Service Commission of the State increased all state freight rates to the level of interstate rates, but denied the application of the roads as to passenger fares and for milk and cream. The Interstate Commerce Commission then raised all state passenger rates and the rates for milk and cream to the level of those ordered for interstate traffic. We then set up a charter contract of the New York Central Railroad providing a two-cent fare for the main line from Albany to Buffalo (pp. 11–17). Attached to the complaint and made a part thereof are the proceedings before the Public Service Commission and Interstate Commerce Commission and a tabulation showing the location of the fifty and more railroads affected by the order complained of.

Upon this complaint an order to show cause was granted returnable January 22, 1921, before a statutory court of three judges consisting of Circuit Judge Martin T. Manton of New York City, Judge George W. Ray of the Northern District and Judge John R. Hazel of the Western District. No injunction pending the return of the order to show cause was asked for or granted.

The answer of the United States (pp. 231–238) and the answer of the Interstate Commerce Commission may not be fairly said to deny the material allegations of the complaint as we have recited, except as they deny the legal effect of some of our allegations and pretend to hold us to strict proof of some of the allegations.

At the hearing we asked for an interlocutory injunction upon the face of the complaint (p. 301) and offered no other evidence. The defendants, however, offered and there were received in evidence the opinions and orders of the Interstate Commerce Commission in the case where the interstate freight rates were increased: certain additional orders of the Public Service Commission, and a colloquy before the Interstate Commerce Commission at the end of the proceeding under review here relative to making the record in Ex Parte 74 a part hereof.

Account of the Litigation Involving Passenger Fares in New York

When the President took over the railroads in December, 1917, there was no interference with state rates until May 28, 1918, when the Director-General raised all passenger fares to three cents a mile. After federal control terminated in

March, 1920, a proceeding was begun before the State Public Service Commission to require the New York Central Railroad Company to restore the two-cent fare between Albany and Buffalo, as fixed in a charter contract to begin September 1, 1920. The railroad resisted the order of the Commission in the United States District Court, but an injunction was denied it in *New York Cent. R. Co.* v. *Public Service Commission,* 268 Fed. Rep. 558.

The Public Service Commission then brought a proceeding in the New York Supreme Court to compel the New York Central to comply with its order. The mandamus was denied in *Public Service Commission* v. *New York Central Railroad Company* (112 Misc. 617), but upon appeal to the Appellate Division the order was reversed upon the merits, the ground being that the two-cent fare having been fixed by charter contract, the fare was restored by order of the Commission automatically upon the cessation of federal control (193 App. Div. 615). The case then went to the Court of Appeals which affirmed and modified the order of the Appellate Division (230 N. Y. 149). The modification became necessary because of events intervening between the time when the case arose in the early summer and December when the Court of Appeals made its decision. Accordingly the Court of Appeals held that although the two-cent fare was restored on September 1, 1920, nevertheless, the case should be remitted to the court of first instance in order that the order of the Interstate Commerce Commission, handed down in November, 1920, and under review in the case at bar, might be pleaded and

proved and its legal effect determined under the status existing in December.

In the meantime, the Interstate Commerce Commission in Ex Parte 74 by its order had divided the country into four zones, the Eastern group including New York, and being bounded generally by the Atlantic seaboard, Canada, Norfolk and Chicago. In this group freight rates were increased forty per cent., passenger and milk and cream rates twenty per cent.; a surcharge of fifty per cent. for space in sleeping and parlor cars was added to accrue to the railroads, but not to the Pullman Company.

Immediately afterwards application was made to the Public Service Commission for a like increase in local rates.

Let us emphasize that no resort to the primary jurisdiction of the state regulatory body was made. The railroads simply offered the ruling of the Interstate Commerce Commission and demanded without proof the same ruling for state rates.

The Public Service Commission, recognizing that freight business for short hauls is notoriously less profitable than for long and under an established policy having kept local freight rates on a parity with interstate rates, granted the demand as to freight but denied it as to fares, milk and cream rates and Pullman surcharge. (Record, p. 29.)

At the same time there had been pending before the Public Service Commission since June 9, 1920, a petition by the Long Island Railroad alleging that a ten per cent. increase in its passenger fares was necessary. This proceeding was abandoned on August 24, 1920.

The reason for this sudden withdrawal from state jurisdiction was obvious. Several of the trunk line railroads under the leadership of the New York Central had determined upon the audacious. The ground work had been laid and the atmosphere created for a resort to the federal jurisdiction after the carriers had almost impudently invited a rebuff from the Public Service Commission. The Long Island road also, if tardily followed the bellwether in a quest for pastures new. It could not join in the downright application of the other roads to the Public Service Commission for a twenty per cent. raise, but it could recover from its tactical error in applying for ten per cent. by withdrawing its individual petition and making all haste for the strategic objective, the nation's capitol.

We pause in this chronicle to emphasize the actual position of the roads in regard to passenger fares at that time. *The New York Central had delayed and finally prevented the restoration of the two-cent fare. The other steam carriers of the state were for the most part three-cent roads and unaffected by the termination of war-time control in this regard. The Long Island on its own showing had need of only a ten per cent. increase, yet the New York Central in resisting a return to a rate of two cents that since* 1853 *had for the most part been notoriously profitable, was demanding an increase to* 3.6 *cents. The other three-cent roads were asking for only* .6 *cents increase.*

The proceeding before the Interstate Commerce Commission took the title No. 11,623. A hearing was held in New York City before the Commission's Chief Examiner on September 13, 1920.

(Record, p. 59.) The State of New York was notified through its Governor, as the statute requires, and was represented by the counsel for the Public Service Commission and by its Attorney-General.

We again resort to emphasis.

a. *There was no stipulation made as in the Wisconsin case and no proof that the conditions of operation in state and interstate commerce were alike.*

b. *Proof was offered as to only a few of the trunk line carriers but the sweeping determination of the Interstate Commerce Commission finally covered roads that were not even in the proceeding.*

c. *We tried the case upon the theory that in any view of the law the control of local rates remained with the state until upon some showing of fact, the transfer of authority to the nation could be justified. We therefore had no case in rebuttal.*

d. *The record discloses only the fact that the state rate of a few roads was lower than the interstate rate. From this the court is asked to suppose that there is either a discrimination under the Shreveport doctrine as developed by Mr. Farrell or a loss of revenue under the theory advanced by Judge Thom in the argument of the Wisconsin case.*

Argument was heard before the Commission on October 11, 1920, and its order was handed down November 13, 1920 (Record, p. 182).

All the roads of New York were permitted until December 18, 1921, to raise their state rates to the level of interstate rates. No time was lost on either side. The trunk line carriers attempted

immediate compliance in order to get the Thanksgiving and Christmas travel. We as promptly started two proceedings in the Supreme Court of New York. We obtained injunctions ex parte against the Staten Island Rapid Transit Railroad and against the Long Island Railroad in Kings County. These were made returnable before Mr. Justice Benedict who extended the injunctions *pendente lite* and wrote an exhaustive opinion. ***People* v. *Long Island Railroad and Staten Island Rapid Transit Railroad*** (113 Misc. 700; 185 N. Y. Supp. 594). We laid the venue of our other action in Albany County against all the other roads named in the order. This was returnable before Mr. Justice Hasbrouck who refused to extend the injunction *pendente lite* on December 18, 1921. No opinion was rendered in this case, but the learned judge dissolved the injunction as to such roads as appeared before him and suggested that proof be taken as to the interstate character of the smaller roads named in the order. An appeal from his order was taken to the Appellate Division, Third Department, but has not been perfected on account of this case coming here.

An appeal was taken to the Appellate Division, Second Department, from the order of Mr. Justice Benedict and the case was decided on the day of argument 195 App. Div. 897; 186 N. Y. Supp. 594. The following is the opinion of the Court:

> "JENKS, P. J. (orally):
>
> "I am ready to announce the decision. Without passing upon the merits of any question presented, we are of opinion that the jurisdiction was exclusively that of the Federal Courts. Disposing of this appeal upon

that point only, we reverse the order which granted the injunction, without costs, and deny the injunction without costs. If the case is relieved of injunction, we grant the application for appeal. You may submit an order with the proposed question. If the Attorney-General will serve upon Mr. Keany a copy of the proposed order, Mr. Keany may present his proposed order to me. The motion for a stay will be denied."

We appealed from this decision, but have delayed perfecting it while this case at bar is pending.

The intervening railroads in the case at bar and the New York Central in another proceeding in the Southern District of New York had with commendable judgment anticipated the determination of the Appellate Division by applying for injunctions in the federal courts against the Attorney-General and the Public Service Commission. The motions of the intervening roads herein had been made returnable before Hon. George W. Ray, one of the judges for the Northern District. We had at that time been negotiating with the Interstate Commerce Commission to expedite an original proceeding here, but the action of the railroads in the federal court necessitated our filing our bill in the District Court. In fact, an adjournment of the railroad's motion was granted on terms requiring us to file our bill there.

Upon the return day, February 19, 1921, no evidence was offered by the plaintiffs. The defendants offered in evidence certain documents, the importance of which they will doubtless discuss. It is important for us, however, to refer to their fourth exhibit, being a colloquy taken down

at the argument before the Interstate Commerce Commission (Record, pp. 417–421). This was received over our objection and exception and we viewed its acceptance with some astonishment not to say alarm. The purpose is of course obvious to so encumber any record involving a review of ICC, 11623 as to make judicial examination impracticable. The record before the Interstate Commerce Commission in Ex Parte 74 is on file with our Public Service Commission. It consists of scores of volumes involving an examination of the entire freight rate structure of the country. We think that insistence upon its admission is disingenuous, since at no time has any officer of the United States here or anywhere else attempted to single out from the mass the things that might be pertinent to this inquiry.

We simply offered our verified bill of complaint or petition with its exhibits and rested. Our failure to prevail was not based upon our failure to support our allegations or to offer further proof. The decree (p. 444), the stenographic record (pp. 306–307) and opinion (p. 422) all show that the appellees' motion in opposition was taken in the nature of a demurrer. Our petition was dismissed for want of equity. In other words, the court taking all our allegations of fact as true, nevertheless decided that as a matter of law our petition did not state a cause of action. At the same time interlocutory injunctions were granted the nine plaintiff railroads, which were also permitted to intervene herein, preventing us from bringing any further proceedings in the state courts. We have not perfected our appeals in these nine cases, pending the determination of this appeal.

After this decision in the case at bar we perfected our appeal and moved to advance. Our motion was granted by this court on April 18, 1921, and the appeal was set for October 10, 1921.

SPECIFICATION OF ERRORS

Our assignments of error are set forth under 21 headings at page 454–459 of the Record. Avoiding a reiteration of these in technical detail, we consider ourselves practically aggrieved and will insist upon the following:

1. That the order of the Commission was not justified;

   a. By the record facts before it,

   b. By the statute under which authority was claimed.

2. If the record before the Commission is found sufficient and the statute is construed to justify the Commission's order, we nevertheless claim the act of the Commission violates the Constitution of the United States in that

   a. It invades the power of the state to control state commerce under the Tenth Amendment.

   b. It takes the property of the appellants and impairs the charter contract with the New York Central under the Fifth Amendment.

   c. It requires that the expenses of interstate commerce be made up from revenue gained in state commerce under the Commerce Clause.

In addition we objected to the admission of the appellees' evidence. It is the legal effect that may be given this rather than the introduction of any new element of fact under this head of which we complain.

ARGUMENT

INTRODUCTORY

Our participation in the exhaustive brief filed by Mr. Benton in the Wisconsin case and our association with him in the argument of that appeal relegates us now to the particular and special. We will, therefore, confine our principal argument to those things which are peculiar and significant in the New York situation, attempting only at the end to extend our discussion into general principles where we think we may profitably supplement the work hitherto accomplished by our colleagues.

This form of treatment necessarily requires at the outset a general statement of matters of fact which will be referred to repeatedly under specific heads. An abstract, or rather our interpretation of the several voluminous documents constituting the record will precede our points.

The Opinions and Orders of the Public Service Commission of New York.

These are made part of our petition to the District Court (pp. 28, 29) and another explanatory of these was offered in evidence by the appellants (p. 408).

Under the statutes of New York (cited p. 415) the roads might have increased all their *freight rates* to the level of the interstate rates upon 30

days' notice without the permission of the State Commission. The record in Ex Parte 74 was before the Commission and the Commission consequently said that in view of the favorable presumption created by that record, dealing as it did only with freight rates, and because of the carrier's power to initiate local freight rates without permission, the State Commission would place no obstacle in the way of a general increase to the level of the interstate rates. Rather, it would await specific objection to particular items (p. 415). This ruling was not applied to *milk and cream* since Ex Parte 74 had dealt with these in the category of passenger traffic (p. 416).

As to *passenger rates and Pullman surcharge,* the Commission denied the application of the carriers generally upon the following grounds.

Citing the New York statute (p. 30-31), it pointed out that the railroads could not initiate an increase in passenger fares. Increases in passenger fares could be brought about only by affirmative action of the State Commission.

This is one of the significant things in the New York case and we believe that only in the case at bar did the State authorities have full control over passenger fares. In all the other cases from various states, which this Court will have to consider, we understand the fares were fixed by statute. In New York the roads had opportunity to make a case before the local regulatory tribunal with a fair chance for relief. In fact the Long Island Railroad was making a case at the time and the Ulster and Delaware Railroad, also joined in the order of the I. C. C., was given an increase to 5 cents a mile by the State Commission on a formal proof of necessity. Nevertheless, the I. C. C. raised this fare to 6 cents by its blanket 20 per cent. increase.

Some claim was made by the New York Central that under its charter contract for a two cent

fare between Albany and Buffalo the change depended upon legislation waiver. The State Commission argued differently. At all events there can be no doubt but that the legislature has delegated to its Public Service Commission all the power it can to increase or to diminish or to adjust state rates for railroads. The benefits of all charter contracts running to the State or municipalities can now be expressly waived by administrative order.

The Public Service Commission Law, Sec. 49, sub. 1 as amended by Laws of 1921, ch. 134 now provides in part:

> " 1. Whenever either commission shall be of opinion, after a hearing had upon its own motion or upon a complaint, that the rates, fares or charges demanded, exacted, charged or collected by any common carrier, *railroad corporation* or street railroad corporation subject to its jurisdiction for the transportation of persons or property within the state, or that the regulations or practices of such common carrier, railroad corporation or street railroad corporation affecting such rates are unjust, unreasonable, unjustly discriminatory or unduly preferential, or in any wise in violation of any provision of law, or that the maximum rates, fares or charges chargeable by any such common carrier, railroad or street railroad corporation *are insufficient to yield reasonable compensation for the service rendered*, and are unjust and unreasonable, the commission may with due regard among other things to a reasonable average return upon the value of the property actually used in the public service, and to the necessity of making reservation out of income for surplus and contingencies, in its discretion, determine the just and reasonable

rates, fares and charges to be thereafter observed and in force as the maximum to be charged for the service to be performed, *notwithstanding that a higher or lower rate, fare or charge has been heretofore prescribed by general or special statute, contract, grant, franchise condition, consent or other agreement, and shall fix the same by order to be served upon all common carriers, railroad corporations or street railroad corporations by whom such rates, fares and charges are thereafter to be observed. Any such change in rate, fare or charge shall be upon such terms, conditions or safeguards as the commission may prescribe.* * * *."

The Petition to the Interstate Commerce Commission

This was paper 3 attached to our complaint and is the second supplemental petition in No. 11623, the case under review here (p. 37).

It was made by the New York Central and ten other trunk line carriers.

It alleges only discrimination as between persons and localities and is not distinctly based upon need of revenue under Judge Thom's theory (pp. 37–58, 63).

None of the 50 or more other roads joined in the determination of the I. C. C. were mentioned specifically in the petition.

Abstract of Evidence before the Interstate Commerce Commission.

In general this record had to do only with a few of the trunk line carriers. No evidence was introduced as to some 50 other roads joined in the determination of the I. C. C. and upon this score we will complain again and again throughout this brief.

We will now refer to the evidence taken before the Commissioners' examiner and attached to our petition (pp. 59–181), using the folio numbers for reference.

The witness Porter for the carriers produced the passenger and milk and cream rates of nine roads (fol. 366). He had only the comparative figures for state and interstate business covering the New York Central. He said the New York Central intrastate business was about 35 per cent of its total (fol. 380). But the examination lapses when he is admonished to be more exact. We have never been able to determine what the proportion is of state and interstate traffic on these roads in all the proceedings in which we have participated. Mr. Porter may have meant main line passenger business or all business.

Charles L. Hunter for the carriers testified that the local rate between Albany and Buffalo affected the whole rate structure of the country (fol. 422). He further speculated that interstate travellers might buy a cheap state ticket and not buy the more expensive interstate ticket to complete their journey until they reach the border of the state (fols. 431, 461). He was indefinite under cross-examination (fol. 532).

Mr. Vosburg testified that the service over the *main line* of the New York Central was similar for state and interstate points (fol. 644).

Mr. Kallman (fol. 727) testified about milk and cream which are comprehended in the main principles we are here discussing.

Mr. Addickes, a witness for the public, testified for the use of the Long Island road (fol. 824). His evidence will be referred to in detail

under our Point XI discussing the special situation of the Long Island and Staten Island roads.

We make no pretense of marked freedom from the bias of advocacy, yet if our adversaries complain that the foregoing serves only our own purposes, we submit that even in the opinion of the Court below no more substance was given to the evidence than in the fragile structure we have erected (particularly pp. 430–432).

We assert, without conceding, that the record, at most, makes out facts relative to fares only as to the New York Central main line.

The Opinion of the Commission

This is our paper 5, pages 182-199. The task was entrusted to former Commissioner Ford and bears the marks of assiduous effort in a *cause celebre*. Despite the learning and ability therein displayed it is our duty to subject it to such critical judgment as we may possess.

Let us express at the outset our disappointment that this judgment of an administrative body, so specially qualified to deal in the downright and practical, should have been expressed in legalistic formulae. We have been told " the worth of competing social ends which respectively solicit judgment cannot be reduced to number and accurately fixed." Yet, Commissioner Ford in exercising the " judge's sovereign prerogative of choice when conflicting social desires seek to dominate the case," tries to disguise the arbitrariness of his decision by a resort to what O. Henry called " the dull insolence of legal phraseology." His resort to stale legalistic conceptions cannot alone support his pioneering which is excusable, if at all, only upon grounds of public policy. There is an entire lack of reality

in the reasons he gives for the Commission's action. The fact is, the railroads wanted more money and they and the Commission assumed out of hand that a blanket increase in all fares would get it.

For instance he says at page 189:

> "This should not be construed as holding that jurisdiction over intrastate rates and fares has been taken away from the states and reposed in us. We find nothing in the law that such was the intent of Congess."

Again at page 186:

> "But in every case which puts in question intrastate rates, the decisive factor is whether or not they affect interstate commerce injuriously to a considerable extent."

He then bases himself upon the record and says:

> "The record leaves no doubt as to the unduly preferential character of the intrastate fares and charges now in effect in New York (p. 191).

This despite the poverty of proof, except as to the New York Central main line.

He then speaks of illustrative instances, citing the fares between New York City and Buffalo, as if this was one of *many* instances in which proof of discrimination had been adduced (p. 192).

Finally he omits commutation rates arbitrarily from his determination. No reason at all is given except the same lack of proof which equally affects every other feature of the case (p. 196).

At page 189 he remarks upon the necessity of increased revenue for the roads. Of course there is no presumption that an increased fare will increase even the gross, let alone the net income of a carrier.

If, as Commissioner Ford says, the state is to lose its control over state rates we again most respectfully submit as we did before him, that the formulae authorizing the surrender or destruction must have another basis than has been given it.

We think Commissioner Eastman has fairly stated some of the difficulties and by no process of steeple chase reasoning has he sought to leap the inescapable obstacles.

The findings are little more than a compression of the opinion.

We doubt if our adversaries will argue that the order can be much supported in its entirety other than as a necessary, although high handed act of statecraft in an emergency. It hardly bears the imprint of officers acting within their jurisdiction.

And so the Commission treated the question in a broad way. It joined the Staten Island in its order although this road had not even petitioned it for relief. It joined the Michigan Central, Pere Marquette and Baltimore & Ohio that do no intrastate business in New York; it joined the Catskill Mountain and Deer River which have been abandoned and taken up; it joined roads like the Attica & Arcade which run wholly within one county of the state; it joined electric lines like the Fonda, Johnstown and Gloversville; with all its generosity it missed some seven roads doing business in the state of far greater importance than many of those joined in the order. Finally it did all these things to nearly all the roads of the state upon the petition of only eleven roads doing business in the state. Most significant of all the Commission refused to touch

the commutation fares because of failure of proof. Surely there was lack of courage here for the record on this point certainly exceeds the references to the Dansville & Mount Morris and the Schoharie Valley.

The point is that the Commission made a drastic order that may be sustained only if it may fairly claim the ultimate in power.

At pages 214–227 is our paper 6 which shows all the roads in New York giving their termini and trackage.

On the first day of June, 1921, the Interstate Commerce Commission reopened the case as to the Fonda, Johnstown and Gloversville R. R. This is an interurban electric road running wholly within three interior counties of New York. We appeared and again moved the Commission not only to vacate its order as to this road but as to all others concerning which there was no proof. Our motion remains undisposed of.

The order of the Commission therefore stands in its entirety and we present the following practical questions among others to be more particularly discussed. 1. Must it be presumed that a lower state rate always and necessarily burdens interstate commerce? 2. Is a lower state rate necessarily not compensatory? 3. Is the state denied its power to arrange for the distribution of congested city population by establishing cheap urban rates?

In what we will say it must be always remembered that historically the railroads of New York grew up as local carriers limited by certain geographical obstacles. We can perceive a difference

between the situation in the West where the railroads came first and the states afterwards; where the railroads are superimposed upon the maps over purely artificial frontiers and really constistitute in many cases an interstate group incidentally doing a local business.

The New York situation on the other hand is complex. The great trunk lines in every case do a vast state business and in addition have important subsidiaries doing almost a wholly state business. It is the difference between the great trans-Siberian route and the railroad system of a densely populated industrial state like Belgium. Broad strokes of policy which might do for the one would injure the other.

We have the best authority for the comparison. President Atterbury at Chicago, on March 23, 1921, before the Labor Board denied the possibility of uniform wage agreements for the roads. As it is to wages, so as to fares.

POINT I.

The appellants have capacity to sue.

The State of New York may maintain this suit according to the express provisions of the District Court Jurisdiction Act, and because under section 13, subdivision 3, of the Interstate Commerce Act it was made and was a necessary party to the proceeding now attacked.

Perhaps this will be countered with citation of *Oklahoma* v. *A. T. & Santa Fe Ry.*, 220 U. S. 277, and see also 220 U. S. 290, 220 U. S. 302. There it was held that a state could not invoke the *original* jurisdiction of the United States

Supreme Court to restrain a carrier from charging unreasonable rates or for the purpose of preventing violation of its own laws.

We distinguish these cases on these grounds. First, in the case at bar, the United States recognized the interest of the State of New York in the proceedings before the Interstate Commerce Commission by making the State a necessary party to such proceedings and by consenting to be sued by any such party. Secondly, the State seeks not only to uphold its statutes, but seeks to prevent an encroachment upon its sovereignty by the affirmative act of officers of the United States. Thirdly, the State shows damage in a proprietary capacity.

The Oklahoma cases point out the natural limitations upon the original jurisdiction of the Supreme Court. Under the Constitution and section 233 of the Judicial Code the Supreme Court has original jurisdiction generally where a State is a party. If, as was attempted in the Oklahoma cases, the State could invoke this jurisdiction whenever its laws were violated, every prosecution for a penalty or any other case where a State was a prosecutor could be brought in the Supreme Court. The court quite sensibly left such cases to the State's own courts or the inferior Federal Courts.

Should it be found that a State may not generally have such an interest in the maintenance of a rate as to permit it to sue a railroad in the Supreme Court for increasing such rates, the case here is different. We have pleaded a special damage to the State amounting to at least $365,000 a year. The pleading of such an interest was

not condemned in *Dakota Central Telephone Co.* v. *South Dakota*, 250 U. S. 163, at 180.

Further no railroad is made a party defendant. The State is given the right to sue by statute and the allegations are against usurpatory acts of officers of the defendant United States. Jurisdiction was taken in the National Prohibition cases under these circumstances. *Rhode Island* v. *Palmer*, 253 U. S. 350; *New Jersey* v. *Palmer*, 253 U. S. 350.

We have also joined the Attorney-General of the State personally and officially. If he is not a good party plaintiff in the case at bar we have the contradiction that he may be enjoined in the cases where the railroads are plaintiffs, but may have no recourse to affirm his own rights in the same tribunal. His right to sue in a representative capacity is confirmed under Equity Rule 38 providing as follows:

> "RULE 38. REPRESENTATIVES OF CLASS. When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole."

Finally the United States may be sued even by a State, only in the tribunal where it has consented to be sued. Under *California* v. *Southern Pacific Co.*, 157 U. S. 229, 258, and *Ames* v. *Kansas*, 111 U. S. 449, 468, inferior Federal Courts may be given concurrent jurisdiction with the Supreme Court where a State is a party.

It has been decided that where a tribunal has definitely been given jurisdiction of the subject matter, a State and its Attorney-General are

proper persons plaintiff to sue in regard to railroad rates. *American Express Co.* v. *Caldwell*, 244 U. S. 617, at 628. In this case jurisdiction is expressly given to the court not only over the subject matter but over the persons of the State and the United States. The jurisdiction of the Federal Courts may be arbitrarily extended by statute, except in a few cases where the Constitution expresses it or delimits it. *Ex parte McCardle*, 7 Wall. 506. In this case a particular statute grants the jurisdiction sought. Abstract principles are not determinative in such a situation.

After this case was brought in the Northern District, the City of New York sought in the Eastern District similar process as to the Long Island roads in a bill entitled *City of New York* v. *The United States and the Interstate Commerce Commission.* The United States in its brief there argued that the cause of action was in the State rather than in its municipalities and succeeded in having the bill dismissed upon this ground and upon the merits.

POINT II.

This Court has jurisdiction to review the facts on which the Report, Findings and Order were made and to set aside the Report, Findings and Order of the Interstate Commerce Commission marked Paper Five.

The report, findings and order are null and void for the following reasons:

First.— They were made without constitutional authority.

Second.— The Commission acted arbitrarily, unjustly and unreasonably fixing rates contrary to evidence and without substantial evidence to support its report, findings and order.

Third.— The report, findings and order were based upon a mistake of law.

Fourth.— The Commission acted beyond its statutory powers.

The facts which sustain the foregoing contentions are discussed in other parts of this brief. If the appellants sustain any of the foregoing contentions this Court has jurisdictions to review and set aside the report, findings and order.

In the case of *Interstate Commerce Commission* v. *Union Pacific Railroad and others,* 222 U. S. 541, Mr. Justice Lamar, delivering the opinion of the Court, says at page 546:

> " These appeals raise the single question as to whether in making the 45¢ rate the Commission acted within or beyond its power. As the statute makes its finding prima facie correct (*Cincinnati, etc., Ry.* v. *Interstate Commerce Commission,* 206 U. S. 142, 154) it will be more convenient to consider the case from the standpoint of the carriers who first insist that the order was void because made without evidence or finding that the 50¢ rate was unreasonable.
>
> " There has been no attempt to make an exhaustive statement of the principle involved but in cases thus far decided it has been settled that the orders of the commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. *But questions of fact may be involved in the determination of*

questions of law so that an order regular on its face may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the commission acted so arbitrarily and unjustly as to fix rates contrary to evidence or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance and not the shadow determines the validity of the exercise of the power. * * *

"The findings of the commission are made by law prima facie true and this Court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience. *Ill. Cent.* v. *I. C. C.*, 206 U. S. 441. Its conclusion of course is subject to review but when supported by evidence is accepted as final but that its decision involving as it does so many and such vast public interests can be supported by a mere scintilla of proof — but the Courts will not examine the facts other than to determine whether there was *substantial* evidence to sustain the order.

"We proceed then to a consideration of the carriers' contention that the order was void because made without any testimony that the 50¢ rate of 1907 to St. Paul was unreasonable."

In another case, *Proctor & Gamble Company* v. *United States of America, Interstate Commerce Commission and others,* reported in 225 U. S. 282, Mr. Chief Justice White wrote the opinion, and after discussing at length the jurisdiction of the Commerce Court, he says, at page 293, referring

to section 20 or 23 of the Act to Regulate Commerce, which sections are concerned with the performance of certain duties upon carriers by the Act to Regulate Commerce, as follows:

> "The words of this second subdivision are: 'Second. Cases brought to enjoin, set aside, annul or suspend in whole or in part any order of the Interstate Commerce Commission.'
>
> "Giving to these words their natural significance we think it follows that they confer jurisdiction only to entertain complaints as to affirmative orders of the commission, that is, they give the Court the right to take cognizance when properly made of complaints concerning the legality of orders rendered by the commission and confer power to relieve parties in whole or in part from the duty of obedience to orders which are found to be illegal."

Still another case which supports the contention of the plaintiffs is that of *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, a case in which the question of the findings of the Interstate Commerce Commission concerning the reasonableness or unreasonableness of rates was considered and also the question of discrimination. Mr. Justice Pitney in writing the opinion says at page 481:

> "Whether a performance or advantage or discrimination is undue or unreasonable or unjust is one of those questions of fact that have been confided by Congress to the judgment and discretion of the Commission (*Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 170), and upon which its decisions, made the basis

> of administrative orders operating *in futuro*, are not to be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power. This results from the provisions of Sections 15 and 16 of the Commerce Act as amended in 1906 and 1910 (34 Stat. 589–591, c. 3591; 36 Stat. 551–554, c. 309), expounded in familiar decisions. *Interstate Commerce Commission* v. *Ill. Cent. R. R. Co.*, 215 U. S. 452, 469–470; *Interstate Commerce Commission* v. *Union Pacific Railroad Co.*, 222 U. S. 541, 547; *Proctor & Gamble Co.* v. *United States*, 225 U. S. 282, 297–298; *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, 91."

To the same effect and a more recent decision is a case argued at the October term, and decided November 8, 1920, *Seaboard Air Line Ry.* v. *United States*, 254 U. S. 57. This was an appeal from the District Court of the United States for the Eastern District of Virginia, to review a decree dismissing the petition in a suit to enjoin the enforcement of an order of the Interstate Commerce Commission, regulating the absorption of switching charges. Mr. Justice Day said:

> "Moreover the determination of questions of fact is by law imposed upon the commission, a body created by statute for the consideration of this and like matters. The findings of fact by the commission upon such questions can be disturbed by judicial decree

only in cases *where their action is arbitrary or transcends the legitimate bounds of their authority.*"

Then follows a long list of cases supporting this contention:

Chief Justice White said in the case of the *Interstate Commerce Commission* v. *Ill. Cent. R. R.*, 215 U. S. 452, 470:

> "The statute endowing the Commission with large administrative functions, and generally giving effect to its orders concerning complaints before it without exacting that they be previously submitted to judicial authority for sanction, it becomes necessary to determine the extent of the powers which courts may exert on the subject.
>
> "Beyond controversy, in determining whether an order of the Commission shall be suspended or set aside, we must consider, *a*, all relevant questions of constitutional power or right; *b*, all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and, *c*, a proposition which we state independently, although in its essence it may be contained in the previous one, viz., whether, even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. *Postal Telegraph Cable Company* v. *Adams*, 155 U. S. 688, 698."

The counsel for the Interstate Commerce Commission in the Wisconsin case practically conceded that the orders of the Commission were subject to adjustment if any of the contentions we make herein are sustained.

POINT III.

The formula of raising all State rates to the level of interstate rates is too rigid to be practicable and too unjust to have been intended by Congress.

We have heretofore pleaded and argued that the order of the Interstate Commerce Commission was: 1, not founded on evidence; 2, not authorized by the statute; 3, unconstitutional at all events. In support of the second and third we offer a criticism of the absurd, unequal and unjust result of the Commission's action as indicating that no such unhappy culmination in the exercise of federal powers was ever intended by Congress or by the fathers.

The rule of law has been that State commerce must not burden interstate commerce. This is very good if limited to its proper field. Yet, the Commission has derived from this a formula for fixing all State rates and destroying the entire rate authority of New York.

The Commission denies that it has any other formula than "State rates must be raised to the level of interstate rates." It says that to apply any other rule would be exercising a power not granted it. The practical result is that State rates may be advanced, but not lowered. If the State rate is too high it may not be lowered, by the

Interstate Commerce Commission, to the level of interstate rates; if it is just right, but lower than the interstate rate, it must be increased; if it is the same as the interstate rate, but unjust in itself, it may not be touched.

As a result the rate from New York to Mount Vernon is the same as the rate from New York to Chicago. The Interstate Commerce Commission denies the power of the State to make it less, it denies its own power under the Constitution to make it less. Density of traffic, peculiarities of operation cannot affect this rate. So it is on the entirely interurban line of the Long Island. The same result is reached for the Fonda, Johnstown and Gloversville, an electric interurban railroad, no different in character than hundreds of other interurban lines, except that it parallels the New York Central a short distance. There can be no relief between Albany and Troy, until traffic on the Michigan peninsula improves so as to permit a lowering of the whole schedule of rates for the trunk line carriers and the Attica & Arcade simultaneously.

The Commission then attempts to find reasons to uphold this result.

Things are to be changed by giving them new names. The railroads already existing are divided into four groups. Our roads fall within the "Eastern Group." Nothing has changed. The main line of the New York Central is still an interstate road. The Attica & Arcade is still a road wholly within Wyoming county. Operating conditions and the competitive situation is still the same on Long Island and about New

York city. The Fonda, Johnstown & Gloversville is still a traction company. Yet, by giving the roads all one name, a community of interests, an indivisible unity is claimed to be accomplished. We pass from the living facts into metaphysics and mysticism. The power of the States may be destroyed, because the roads that were once in the States have now by an *ipsi dixit* been transported into an "Eastern Group" and their situation thereby is claimed to be transformed.

Still, this is a simple way. It relieves the Commission of work, and the power may be broadly exercised to the benefit of the railroads which were in pressing need of aid, without regard to individual rights. If the action is condemned as hysterical, the Commission suggests that it may later right the wrong. The mortgage is to be foreclosed without any parties defendant and their rights are to be disposed of by orders *nunc pro tunc* as they may later appear.

However, the Commission perceives that this broad stroke of policy is not enough. It attempts to establish itself upon various grounds. It submits that the power exercised is justified where there is unity of management and operation. The great "Eastern Group" idea is too large to fit here. Unity of management and operation may be a determinative factor for trunk line roads only; jurisdiction over the Attica & Arcade is concededly lost to the Interstate Commerce Commission under this. Yet, even this factor will not stand criticism. If unity of management and operation is decisive, it is left to the railroads by combination with interstate roads to determine whether they themselves will

assume state or federal control. The Delaware & Hudson Company could simply operate its subsidiary, The United Traction Company under the title, " The Delaware & Hudson Company " and the Albany street railroad would fall into the class of the Fonda, Johnstown & Gloversville.

Another determinative factor is proffered; the existence of Interline business is declared to be decisive. If this is so, the subway in New York then comes under the jurisdiction of the Interstate Commerce Commission as soon as it and roads running into New York begin to sell stickers permitting the beginning or termination of an interstate journey over it.

The remedy provided by the Commission is extravagant. On the contrary, let expensive interstate trains be made extra fare trains. Poor service may not be given at an exorbitant rate in northern New York and on the Hojack roads throughout the State, in order to provide terminal facilities in Cleveland, Ohio. The power to fix rates is the power to control service. Unless a regulating authority may provide revenue to carry out its commands, it is helpless. This taxation of the State of New York destroys every bit of its substantial power.

The National and State powers may be harmonized. The courts have pointed out that there is an irrepressible conflict, only where there is " proved undue discrimination against persons and localities in interstate commerce." This is a formula that is exact and may be equally employed. Every word of it has a distinct application. Commissioner Ford's opinion on the contrary rides too many horses. Accept his reasons and no man may say where we will be taken.

Hon. Charles F. Amidon of Fargo, North Dakota, in an address delivered to the American Bar Association in 1907 (Report 1907, page 463), boldly proclaimed the principle, which Commissioner Ford avoids. Mr. Jackson E. Reynolds likewise stated a logical position in his article "*Railway Valuation — is it a Panacea*" published in the Columbia Law Review April, 1908.

Messrs. Amidon and Reynolds boldly reject the law as we have known it and as we argue it is. Yet, they start with a premise and come to a conclusion. Their writings have a logical as well as a rhetorical excellence. We submit that a scientific quality is indispensable in the development of our constitutional law. We assert that the finely balanced structure of our government under a written constitution will not be improved by stop gaps and patch work based upon an hysterical plan to aid one of the great undertakings of the country in a crisis which even now is passing.

There remains in our attack upon this outrageous formula of the Commission and their reasons therefor to point out another injustice.

The scheme of the Commission may increase the local rates above interstate rates. That is, the rate from Utica to Albany is made 3.6 cents, but the rate from New York to Chicago is made less.

Mr. Hunter, assistant to Trunk Line Association, passenger department, testified that all passenger rates in New York, both state and interstate, below three cents a mile were advanced to that minimum by Order 28 of the Director General. The rates in effect for intrastate passenger service in New York at the taking effect of Order 28 were as follows:

Name of carrier.	Rate in cents per mile
New York Central:	
Adirondack Division	2.5
Buffalo Division	2.
Harlem Division	2.5
Hudson Division	*2.1
Mohawk Division	2.
Ontario Division	2.5
Ottawa Division	3.
Pennsylvania Division	2.
Putnam Division....Varies from	2 to 3.
Rochester Division	2.
St. Lawrence Division	2.5
Syracuse Division	2.
Line West of Buffalo	2.5
New York, Chicago & St. Louis	2.5
Buffalo, Rochester & Pittsburgh	2.5
New York, Ontario & Western	2.5
Delaware & Hudson Co	3.
Pennsylvania Railroad:	
Buffalo & Allegheny Division	2.5
Elmira Division	2.

Lehigh Valley, varies from 3 cents per mile short line distance to 2.5 per mile.

Erie.....same as Lehigh Valley

Delaware, Lackawanna & Western, same as Lehigh Valley.

* i. e., 2.1 to 1.17.

The following questions by Mr. Paulding and answers by Mr. Hunter reveal the solution of the whole conflict between the arbitrarily fixed war rates for intrastate fares and the 3.6 cents rates now in force by virtue of *Ex Parte* 74.

> Q. Your experience, of course, has made you familiar with the effect of the geographical situation the state of New York has on the passenger rate structure in the East?
>
> A. Yes, sir.

Q. What is that effect?

A. Well, the effect is that New York and Buffalo, being such important commercial centers, that they practically are a fundamental key, you might say, to the entire rate fabric of this country. You cannot disturb the rate between New York and Buffalo, or Albany and Buffalo for instance, in this particular instance and make it three cents a mile, without very seriously affecting the entire rate fabric of the country.

Q. Will you enlarge that a little bit and show how and in what way, as a practical matter, that statement of yours works out?

A. Passengers can take advantage of the lower intrastate fares of the New York Central from New York and other points to Buffalo to secure through transportation at less than the interstate fares on combinations, by buying tickets to Buffalo and repurchasing therefrom, as illustrated by the following examples:

Through fare New York to Cleveland, which is interstate, $20.52. Combination New York to Buffalo, intrastate, $13.16; Buffalo to Cleveland, interstate, $6.56: total $19.72, or on purchase a saving of 80 cents on every ticket (fols. 421-425).

It was also pointed out that if a Cleveland passenger rode in a sleeper to Buffalo on an intrastate ticket he saved the surcharge of $1.25, which added to the 80 cents makes a total saving of $2.05. It was not claimed that any actual cases of defeat have been discovered; simply that they are likely to occur. The inconvenience involved to the traveller, the few trains whose schedules would permit any such smart practice,

the loss of ride in Pullman between Buffalo and Cleveland, and the notorious fact that the traveller by Pullman car on an interstate journey must order his accommodations weeks rather than days in advance, make the whole matter of "beating" the interstate fare speculative, as Mr. Hunter admitted on cross-examination.

But to return to the main text, which is the necessity (so the carriers claim) that every way fare in New York must be 3.6 cents a mile, not because of *New York* conditions, but because of *interstate* conditions:* because interstate fares are now 3.6 cents a mile. Examiner La Roe asked these questions and Mr. Hunter answered them as appears:

> Q. I do not understand that you directly answered Mr. Paulding's inquiry, which is one I am considerably interested in, and that is the extent to which, if any, the lower rates between Buffalo and Albany affect the through passenger rates between the East and the West. Will it, in your judgment, require a reduction in the interstate fares below their present level, or will it merely facilitate the defeat of the interstate fares through repurchase?
>
> A. Well, Mr. Examiner, in that regard, in addition to the possible manipulation of the rates on the part of passengers, as I have before said, a situation of this kind is very serious, in that there are other arteries of travel that are affected by it. For example, between New York and Chicago as I explained before. Buffalo is a very important gateway. The New York Central operates via this gateway. These opportunities for repurchase are there. Now, there are other lines operating via various other gateways,

* "Geographical Situation" according to Mr. Paulding.

through Pittsburgh, Salamanca, Wheeling, through Parkersburg; and the lines on their own bottoms, under existing conditions, and competition being an element in the conduct of the properties, you can see that sooner or later there is going to be an agitation on the part of those lines which are adversely affected, to bring about some parity of conditions that exist under a normal basis of making interstate rates: that is one of the things involved in this whole situation.

By Mr. Paulding: Q. Now, Mr. Hunter, going to the New York-Buffalo situation, what is the intrastate rate between New York and Buffalo?

A. The intrastate rate between New York and Buffalo is $13.16 over the New York Central.

Q. And take the other lines between New York and Buffalo, what is the rate under present interstate rates over those lines?

A. $14.27.

Q. All of those rates being larger?

A. They are.

Q. Assume, if you will, that the New York State rates continue in effect, three cents a mile, what will be the ultimate effect on the other rates between New York and Buffalo?

A. Well, judging by past experience, I should say that they might not endure for any great length of time.

Q. Would they have to meet the New York State rate?

A. They would, sir.

Q. Decrease interstate rates to that extent? (fols. 433-440).

A. I think it [they] would, inevitably.

After giving several illustrations of the difference in rates, state and interstate, due to the difference between 3.6 cents and 3 cents multiplied

by the number of miles involved, Mr. Hunter was asked by Mr. Paulding and answered as follows:

> Q. In other words, the Albany-Buffalo rate is the key to the eastern rate situation?
> A. Albany-Buffalo is the key to the New England situation, and the New York-Buffalo is the key to the balance of the country.
> Q. And if the rates remain as they are interstate [intrastate] will that inevitably affect the [intrastate] interstate rate as a matter of competition?
> A. Yes.
> Q. Will it bring it down or leave it alone?
> A. Bring it down.
> Q. To the level of the state rate?
> A. To the level, at least, of the combination and the state rate, I should say (fol. 473).

On cross-examination Mr. Hunter testified that there were eight (8) competitive routes between New York and Chicago, viz., New York Central; West Shore; New York, Ontario & Western; Erie; Lackawanna; Lehigh Valley; Pennsylvania; and Baltimore & Ohio.

> Q. (By Mr. Hale): Now the New York Central goes up north as far as Albany, then west to Buffalo and around Lake Erie by the Lake Shore and Michigan Central and the most southern route is the Baltimore & Ohio?
> A. Yes.
> Q. Does that go through Washington?
> A. Yes.
> Q. The Pennsylvania is the short line of all?
> A. Yes, sir.
> Q. And the through rate of all these [eight] railroads is found by multiplying the mileage of the Pennsylvania by 3.6?

A. Substantially so, Judge, but I would like to get this clear upon the record, just how the rate is made today.

Q. Very well.

A. The short line from New York to Chicago is via the Pennsylvania Railroad, distance 906 and a fraction miles. It makes three cents a mile, as established by the Railroad Administration $27.22. To that, under the authority of the Interstate Commerce Commission in *Ex Parte* 74, 20 per cent was added, so that that has the effect of establishing the present interstate rate between New York and Chicago of $32.67.

Q. Well, that really if you divide $32.67 by the number of miles you get the quotient of 3.6?

A. Substantially, I should say. I have not tried it.

Q. Well, that is the basis?

A. That is the basis.

Q. If there is any difference, it is one of fractional and not of consequential amount?

A. Yes.

Q. That makes the rate, therefore, 3.6, less than that on every competing line?

A. Yes, sir.

Q. Which is the longest road, Baltimore & Ohio or New York Central?

A. I could not say offhand. The New York Central is not the longest line. I should imagine perhaps the Baltimore & Ohio.

Q. Have you any idea what the Baltimore & Ohio gets per mile on that same rate?

A. No, I have not precisely, but we could figure it out.

Q. It is a question of computation, is it not?

A. A question of computation; yes, sir.

Q. In other words there is only one carrier between here and Chicago that is going to receive net 3.6 per mile?

A. Yes.

Q. And yet you propose to make — I say you propose — I assume you identify yourself with the New York Central and the other petitioners here. You propose to make every local passenger in the state of New York pay a greater rate for his ride from one point to another than you receive on the through route on any of these others except the Pennsylvania? In other words, that the rate fixed by the Pennsylvania by reason of competitive conditions between New York and Chicago is to determine every local rate in the state of New York, and determine it at a higher figure than between New York and Chicago?

A. Well, Judge, of course, I could not subscribe to that proposition.

Q. You think that I am arguing the case?

A. Because it is competitive.

Q. Is not that the fact, beneath it all, that only one carrier,— that the whole business is determined by competitive conditions, so far as the New York-Chicago rates are concerned; that you cannot allow any one road to charge or make the others charge the same rate precisely; if they did, one road would get all the traffic — is that the idea — the short road?

A. Well, the Railroad Administration, I might say, prior to Federal control, the rates between New York and Chicago were not alike by all lines. They were alike by the New York Central and the Pennsylvania, and the other lines were known as differential lines and a like rate obtained. The Railroad Administration decided that the rate should

be alike by all lines. In other words, that the basic rate of three cents per mile should be the establishing factor in making the rate. They, therefore, established like rates on all lines between New York and Chicago, made on the short mileage on the Pennsylvania. Now, in approaching the equalization of fares, the long prevailing custom and practice that had been in effect throughout the country was taken into consideration. In other words, the fares between New York and Chicago, being great commercial centers, it was felt that they should be alike in order to accommodate the enormous travel between those two points, by giving the passengers the maximum train facilities between those two points; and that was true of a great many other commercial centers, like between New York and Pittsburgh, New York and Washington and New York and St. Louis. Entirely aside from the competitive conditions, as you are trying to represent as between the carriers themselves, my own view is that while the carriers were naturally concerned as between themselves, from a competitive standpoint, it is not one-sided, in that the traveling public were benefited to the extent that the carriers have not taken the full advantage of the 3.6 cents per mile, so that the passengers on the long haul got the advantage of the common rates and with the maximum train service.

Q. I understand you are making [asking] here for a rate of 3.6 cents per mile on all local tickets between any two points, between stations on the New York Central, including Albany and Buffalo?

A. Yes, sir.

Q. The real foundation for your asking for that is the fact that the rate from Chicago to

New York is determined by the mileage of the Pennsylvania?

A. No, sir, absolutely not.

Q. Why should the rate between Schenectady and Utica, for illustration, or Utica and Syracuse, or any other two stations ten miles apart, depend remotely on a fare which must be fixed by competitive conditions existing between Chicago and New York, by reason of these various routes?

A. Judge, we are not attempting to rest our case on the New York-Chicago situation. As I understand it, we are simply trying to explain the facts in the case — what the result would be if the rate fabric in the state of New York stands where it is today.

Q. I suppose there are no two roads to Buffalo — that is the Lehigh, the Lackawanna, the Erie and the New York Central all have different mileages?

A. Yes.

Q. That rate is determined by the road with the least mileage?

A. The Lackawanna Railroad.

Q. So you take a passenger who rides over your road from Albany to Buffalo — you take a less rate per mile than the Lackawanna receives?

A. That is true, but again I say, if there is any disadvantage in that, it is against the carrier and not the public.

Q. There is no exception in your prayer for relief, or what you desire to accomplish by this proceeding or any similar proceeding,— no exception in favor of local fares at any less than 3.6?

A. No, sir (fols. 547-567).

So here is the position of the New York Central and other carriers in this case. All local rates whatsoever in the state of New York must equal

the rate per mile of the shortest railroad between New York and Chicago, and the shortest railroad between New York and Buffalo — although seven of the eight competitors of the Pennsylvania (including the New York Central) for New York-Chicago passengers must take less per mile, and although four of the five competitors of the Lackawanna (including the New York Central) for New York-Buffalo passengers must take less per mile.

To understand the full import of the carriers' position is, we respectfully urge, to reject it, both as matter of justice and as matter of law.

Interstate Commerce Act, § 13 (4)
The Minnesota Rate Cases, 230 U. S. 352, 412
Shreveport Rate Cases, 234 U. S. 342
American Express Co. v. *Caldwell*, 244 U. S. 417
Illinois Central R. R. Co. v. *Public Service Commission*, 245 U. S. 493

In none of these cases were any more of the state rates invalidated than those which the court held to be in *direct* conflict with lawfully established interstate rates. And § 13 (4) of the amended Interstate Commerce Act goes no further.

POINT IV.

Regulation of Interstate Commerce may not provide revenue from State Commerce.

Although States may not burden interstate commerce, there is a reciprocal obligation preventing the nation from destroying that which

belongs to the States. It may not properly be said that all the power of the United States cannot be exercised without destroying all the power of the States. The two powers are to be exercised harmoniously.

Commissioner Ford says at folio 934 that the revenues derived from interstate and State commerce may be so commingled as to give Congress absolute control over both. There is direct authority to the contrary. In the great case of *Smyth* v. *Ames*, 169 U. S. 466, Mr. Justice Harlan said at page 541:

> "The State cannot justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, over which, so far as rates are concerned, the State has no control. *Nor can the carrier justify unreasonably high rates on domestic business upon the ground that it will be able only in that way to meet losses on its interstate business. So far as rates of transportation are concerned, domestic business should not be made to bear the losses on interstate business, nor the latter the losses on domestic business.* It is only rates for the transportation of persons and property between points within the State that the State can prescribe; and when it undertakes to prescribe rates not to be exceeded by the carrier, it must do so with reference exclusively to what is just and reasonable, as between the carrier and the public in respect of domestic business. The argument that a railroad line is an entirety; that its income goes into, and its expenses are provided for, out of a common fund; and that its capitalization is on its entire line, within and without the State, can have no application where the

State is without authority over rates on the entire line, and can only deal with local rates and make such regulations as are necessary to give just compensation on local business."

Yet Commissioner Ford cites the *Minnesota Rate Cases* as establishing the contrary when no such language appears in the opinion. His inference is general; it cannot be established by precise reference to any part of the opinion of Judge Hughes.

The power to regulate interstate commerce does not permit the collection of revenue in this State for building up agencies of commerce in the west or especially for the purpose of meeting losses incurred in commerce outside of New York where operating conditions are entirely different.

The amendment to the Constitution permitting the present income tax made the country one tax district. Under an income tax, money may be raised in New York for national roads in New Mexico and, perhaps, for schools in California. Yet, we deny that money may be raised directly by Federal authority in New York by an increase in local rates to meet the expenses of a railroad outside the State.

POINT V.

The New York Central is doing business under a charter contract. Only by an abandonment of its charter and federal incorporation may it avoid the two cent fare.

The railroads of New York grew up, beginning in 1826, contemporaneously with the development of the immense traffic upon the Erie canal after

its original completion in 1823. Some of the constituent companies making up the New York Central within New York were at first franchised only for passenger traffic, and then generally the others were permitted to carry freight in winter only, upon payment of the canal tolls to the State. Later they were permitted to furnish what amounted to an express service by carrying freight all the year round upon paying the canal tolls to the State when competing with the State's project. See Revised Statutes, 3d Edition, Vol. I, page 219, where many of these acts are collected or referred to; also L. 1851, ch. 497, repealing the tolls, Whitford's Canal History and *infra*. The State further made a direct loan of $3,000,000 to one of the roads and $600,000 in loans to several other roads, insuring their completion and operation within their limited local field. (Whitford Canal History, vol. 1, page 234.) The competition of the canal, therefore, was from earliest times the basis of rate-making in New York, as has been judicially recognized. Mr. Justice Hughes says in *The Minnesota Rate Cases*, 230 U. S. 352, 413:

> "More potent than these provisions (early state legislation) in the actual effect upon railroads' tariffs, was the state canal. It is a matter of common knowledge that the traffic on the trunk lines from the Atlantic sea board to the west was developed in competition with Erie Canal, built, maintained and regulated by the State of New York to promote its commerce."

The canal was an agency of interstate commerce long before the local lines now making up the New York Central were consolidated, and before

Congress by the Act of June 15, 1866 (U. S. Stat. at Large, ch. CXXIV) had given the roads their first recognized interstate status by permitting connection with roads of other states. The situation differed from the great transcontinental railroads constructed primarily for purposes of interstate commerce under Federal charters or authority and through territories which have since become states. The point is that in the beginning the State of New York had, and exercised exclusive jurisdiction over the New York Central. Federal interest in the roads developed after the State had laid the foundation for certain agreements and regulations which have never been a direct burden upon interstate commerce and which have not yet been shown to be indirect burdens, which Congress by legislation might now prohibit. Historically, we are not dealing with a State regulation exercised only by virtue of Congressional acquiescence. We are dealing with exclusive powers of the State reserved to it and under which it was fully competent to deal with the whole subject matter.

When these contracts were made by the State with the railroads we have the paradox of the State regulating purely local carriage to stifle and then to equalize competition with an interstate agency, the canal. Certainly there was no poverty of authority in the State at this period where, by its own act, it suppressed localism in favor of nationalism. Federal authority cannot complain because the State found it good policy to burden local commerce in favor of interstate commerce.

Accordingly the State began to make the regulations described in favor of the canals and then

by contracts assured the railroads of a comparatively high rate of return to insure their practicability in the very narrow local field occupied by them.

The New York Central Railroad Company was formed from the following roads, the rate of fare being fixed as indicated.

1. The Mohawk and Hudson Railroad Company was incorporated under L. 1826, ch. 253, a private act, as the first steam railroad in this State. *There was no restriction in regard to the rate of fare for passengers.* This statute was amended by Laws 1828, ch. 122; 1832, ch. 79; 1834, ch. 20; 1834, ch. 39; 1837, ch. 383; 1838, ch. 224; 1847, ch. 91. By the last the name was changed to The Albany and Schenectady Railroad Company. None of the other amendments dealt with fares. The original charter was also amended by L. 1851, ch. 20. These laws remain unrepealed. Another railroad to be operated otherwise than by locomotives was provided for under L. 1867, ch. 459, with the name Albany & Schecentady R. R. Co.

2. The Schenectady & Troy Railroad Co. was organized under L. 1836, ch. 427, a private act which fixed the passenger *fare at 6 cents a mile.* The statute was amended by Laws 1839, ch. 31; 1840, ch. 299; 1843, chs. 134, 135; 1847, chs. 270, 272, 405; 1850, ch. 224. These laws did not change the fare and remain unrepealed.

3. The Utica and Schenectady Railroad Company was organized under L. 1833, ch. 294, a private act, and the fare was restricted thereby at *4 cents a mile.* The law was amended by Laws 1837, chs. 12, 363; 1838, ch. 282; 1844, ch. 335; 1845, ch. 342; 1847, chs. 270, 272, 405. These laws

did not affect the fare and remain unrepealed, except as L. 1844, ch. 335, may be regarded as a constructive repealing act.

4. The Syracuse & Utica Railroad Company was organized under L. 1836, ch. 292, a special act, and the fare was *restricted to 4 cents.* The statute was amended by Laws of 1841, ch. 24; 1844, ch. 335; 1845, ch. 343; 1847, chs. 270, 272, 405. These laws remain unrepealed and the fare was not changed.

5. The Rochester & Syracuse Railroad Company was the result of a consolidation of the Auburn & Rochester and Auburn & Syracuse. The Auburn & Rochester was organized under L. 1836, ch. 349, a private act. *The fare was fixed at 3 cents.* It was found impossible to procure stock to be taken with this restriction and so it was authorized to *charge 4 cents* (Assembly Documents for 1849, No. 166). This was done by L. 1837, ch. 11. The original act was also amended by Laws 1838, ch. 290; 1840, chs. 195, 208; 1841, ch. 184; 1844, ch. 335; 1846, ch. 179; 1847, chs. 93, 270, 272, 405. The fare was not changed and these laws remain unrepealed. The Auburn & Syracuse was organized under L. 1834, ch. 228, a private act. Fare was *restricted to 4 cents.* The fare was *raised to 5 cents* for three years by Law 1839, ch. 257. The act was also amended by Laws 1837, ch. 158; 1838, chs. 57, 293; 1844, ch. 335; 1847, chs. 131, 270, 272, 405. The rate of *fare at 4 cents was restored* in 1842 by limitation of the Act of 1839 and sections 12 and 16 of the original act were expressly repealed respectively, by Laws 1886, ch. 592; 1838, ch. 57. Otherwise the statutes remain unrepealed. These two roads

were consolidated by a private act, Laws 1850, ch. 239, on Aug. 1, 1850, under the name of Rochester & Syracuse Railroad Company. *No mention of fares was made* in the consolidation act or in the certificate of incorporation. The consolidation act was never amended and remains unrepealed.

6. The Buffalo and Rochester Railroad Company was formed on December 7, 1850, by consolidation of the Tonawanda Railroad and the Attica and Buffalo. The Tonawanda Railroad was organized under Laws 1832, ch. 241, a private act. *No fare was fixed in* this act, but by section 15 the railroad could determine its own tolls. The statute was amended by Laws 1844, ch. 17, restricting the *fare to four cents* and by Laws 1846, ch. 292, which fixed certain freight rates. Other amendments were: Laws 1840, chs. 116, 200; 1844, chs. 17, 50, 335; 1846, ch. 292; 1847, chs. 270, 272, 405. The Attica and Buffalo was formed under Laws 1836, ch. 242, a private act, *restricting the fare to 3 cents.* Section 13, immaterial here, was repealed by Laws 1886, ch. 593. The statute was amended by Laws 1843, ch. 169; 1838, ch. 283; 1842, ch. 80; 1843, ch. 169; 1844, ch. 335; 1847, chs. 29, 270, 272, 405; 1849, ch. 113. These statutes remain unrepealed and the fare was unchanged. The railroads were consolidated as the Buffalo and Rochester Railroad Company on December 7, 1850, under Laws of 1850, chapter 236. The railroads under section 2–3 of this act were given the powers and privileges generally granted railroads under Laws 1850, ch. 140, permitting a 3-cent fare.

7. The Rochester, Lockport and Niagara Falls Railroad Company had its origin in the Lockport

and Niagara Falls. This was formed under Laws 1834, ch. 177, a private act, which *fixed fares at 4 cents*. The statute was amended by Laws 1847, ch. 408; 1842, ch. 36; 1837, ch. 99; 1841, ch. 122; 1849, ch. 259; 1850, ch. 105. Under Laws 1850, ch. 111, the road was incorporated with additions as the Rochester, Lockport and Niagara Falls Railroad Company. See also Laws 1851, ch. 228.

8. The Buffalo & Lockport Railroad Company was originally incorporated on April 29, 1852, under the general act Laws 1850, ch. 140, permitting the roads by section 28, subd. 9, *to charge 3 cents a mile* for a passenger and his baggage.

9. The Mohawk Valley Railroad Company was likewise so incorporated on December 29, 1852.

10. The Syracuse and Utica Direct was likewise so incorporated on January 26, 1853.

The Constitution of 1848 had provided for incorporation by general act and so the later railroads had incorporated under the general law providing 3 cents. Yet it is to be noted that the general law in section 49 of Laws of 1850, ch. 140, contained a "very cautious provision" permitting railroads under special charters to charge a greater sum where the charter so prescribed and protecting the contract. *Johnson* v. *H. R. R. R. Co.*, 49 N. Y. 455, at 459 and 463.

It was later held that these charter fares were not changed by any later general legislation expressing the rate-making power, except where a consolidation privilege expressly provided for a lower fare as a condition of offer and acceptance. *Parker* v. *Elmira, etc., Ry.*, 165 N. Y. 274.

In the meantime the irrevocable nature of these agreements with the State had long been urged

by the railroads before their contentions had been specifically recognized by the saving clauses for charter fares in the Railroad Law of 1850 and in Laws 1848, ch. 140, § 46.

These arguments are found in certain public documents of New York of which the courts of New York have heretofore taken judicial notice. See *Public Service Commission* v. *New York Central R. R.*, 193 App. Div. 615, 230 N. Y. 149. Remonstrances were filed by the several railroads on the line from Albany to Attica, Wyoming county, and by the Auburn, Syracuse and Tonawanda Railroad companies against petitions to the Legislature for reduction of fares. (Assembly Documents, No. 194, Vol. 5, 1845.) The railroads claimed in part:

> "In most of these charters, or propositions, on the part of the Legislature, to those who choose to accept them, and hazard their property in the undertaking, there is a provision, that those who make the roads upon the terms of the proposition, may receive four cents per mile for the transportation of a passenger and his baggage. That after the road had been ten years in use, the State, (that is the people) may take it from its owners, on paying them the whole cost of construction of the road, with all moneys expended for permanent fixtures, with interest on such sums at the rate of ten per cent per annum, together with all moneys expended for repairs or otherwise, deducting the tolls received. There laws or charters are on the part of the people of the State, *a naked offer of these advantages to those who will, with their capital, build these roads for the benefit of the people, upon the guaranty contained in them.* We admit that there

is a right reserved to alter, modify or repeal the act, but we do most respectfully but earnestly insist that this reserve power will not allow the Legislature to destroy the guaranty upon which the investment was made, and the work accomplished. If the companies shall abuse their privilege or violate any provision of law, then we admit that the power of alteration, or repeal, may be exercised."

These remonstrances were signed by the presidents of the Mohawk and Hudson, Utica & Schenectady, Syracuse and Utica, Auburn & Rochester, The Tonawanda, and the treasurer of the Auburn and Syracuse, the New York Central's predecessors in title.

The report of the Assembly Committee on Railroads (Assembly Doc. No. 224, Vol. 6, for 1845) accepts the argument that a contract existed. The committee says in part:

"The charters created by the Legislature may be considered as offers or inducements held out to individuals by the State inviting them upon the terms which they contain, to invest their money in the construction of works deemed to be of public utility and importance. These inducements are the right to receive tolls, either unlimited or restricted; the right of managing their own affairs, within reasonable bounds, and a definite period for the continuance of such rights. The subscription of stock in such corporations and the construction of work contemplated by the charter, is the acceptance of the stockholders of the proffer made by the State in the grant of the charter. This proffer and acceptance constitute a contract between the

stockholders and the State, which all will admit should be observed in good faith by the sovereign contractor.

If this was all that vested in the given case, it would make a contract that might find security in judicial protection, and the State would not retain its power to violate it by subsequent legislation. But there is another feature in our legislation in this State which enters into, and makes part of all the charters, and may materially affect, in a more legal aspect, the contract contained in the grant and acceptance of such charters. By a general law the Legislature reserves to itself the right of altering or repealing any corporate charter, and this reservation, for greater caution, is also inserted separately in each. This being one of the terms of the contract, must be taken into account in giving it a legal construction. This provision is incorporated specifically in all the railroad charters granted by the Legislature of this State. There are, however, other provisions in them which, as to some features, may tend to qualify this general reservation, even in giving them legal construction. If there was nothing but the general reservation, the Legislature would doubtless have the strict legal right to reduce the rates of fare on railroads, or to deprive these corporations wholly of the privilege of charging fare, or any other advantage given by the charter, however oppressive or unjust such deprivation might be, because the power was gven by the letter of the contract; as to the right to deprive income from the railroads there is a peculiar provision in all the charters. The Legislature appear to have thought proper to grant privileges proportionate to the risk; but still

it might happen that the privilege granted would give too great a profit to the successful adventures. It was necessary to retain some power over corporations, in the aspect of a possible result, by some provision which would prevent them from becoming too powerful or wealthy.

To reach this case, the Legislature have inserted a provision in each of the charters, authorizing the State to take from the stockholders the entire road, upon payment to them of all the money invested therein, with interest thereon, at rates varying from ten to fourteen per cent, deducting the income thereof, received by the stockholders. This has been by some deemed as in effect saying to stockholders, that they might realize as much income as they could under the provisions of the charter, as a compensation for the risk, but if it exceed ten or fourteen per cent, the State will take it into their own possession; and that as to this feature of the grant, the reservation is all the control the Legislature will exercise.

* * * * * * *

It may be very plausibly urged that, as by these provisions the Legislature have adopted one mode to guard against the excess of income, that the mode thus adopted is exclusive of all other modes, and that the only remedy which they had retained for an excess of income, is the appropriation of the road, upon payment, according to the stipulation, and that they could not resort to a modification of the charter merely for the purpose of limiting income. The committee do not feel called upon to give a mere technical legal construction to the contracts contained in these charters, as modified by these provisions."

The report of the Assembly Committee on Railroads (Assembly Doc. No. 166 for 1849, Vol. 3) states that the railroads always insisted these early charters constituted contracts under the Dartmouth College Doctrine, despite the reserved power always expressed in the statutes and later incorporated in the Constitution (Vol. 1, Revised Statutes of N. Y., page 600, § 8; Const. of N. Y., Art. 8, § 1). It said in part:

> "These railroads have uniformly insisted, that although there was a provision in each of the charters, that the Legislature might alter or repeal it, yet as to fare they could only change it by taking the road under the above provision."

The Assembly Committee on Railroads (Assembly Doc. No. 51 for 1846) later assumed that the reserved power to "alter or repeal" contained in the charters was sufficient to authorize a change. Again in Assembly Doc. No. 88 for 1851, the same committee said in part:

> "Some of the corporations whose charters contain specific provisions with regard to fare, while contending that they are not legally bound by this provision of the general law, nevertheless express a willingness to submit to and comply with its requirements. Were this otherwise, it would be in the power of the State to compel submission, by buying them out on the terms reserved in their respective charters, as there can be but little doubt the State would find other companies ready to purchase on the same terms."

In all this contemporaneous construction of these early charters it should be noted that even

the most extreme servant of the public interest never claimed that the fares could be fixed under the common law regulatory powers over common carriers. In other words, that part of the police power known as the " ratemaking power " comprehended as part of the common law was never invoked. If the rates could be reduced it was said that this could be done only by the reservation in the contract, put there to avoid the inevitable consequence of the Dartmouth College case as against the State. The railroads consistently denied that fares could be changed even under the reserved power, regarding the fares as an integral part of the property in their franchise.

Agitation for reduced fares continued, however. The railroads consented to a reduction in fares in return for a decided advantage. A private charter was offered the ten roads whose charters and fares are listed above, permitting them to consolidate. Despite the Constitution of 1848, providing for general corporation laws, a private law was necessary to do this very special thing. This is Laws 1853, ch. 76, pleaded at pages 11-17 of the record. There was nothing mandatory requiring the railroads to accept it. The ten railroads which are expressly named therein " or any two or more of them are hereby authorized at any time to consolidate such companies into a single corporation in the manner following." Then followed the conditions, the seventh being:

> " When any two or more of the railroad companies named in this act are so consolidated, said consolidated company shall carry way passengers on their road at a rate not to exceed, two cents per mile."

Since the roads so named ran, generally speaking, from Albany to Buffalo, two cents had been, until the war, the fare on this route, now part of the New York Central.

The railroads accepted the offer on July 7, 1855, by filing a consolidation agreement in the Secretary of State's office. The fare was incorporated in the certificate by reference generally to the act. The name, New York Central Railroad Company, was adopted.

The Hudson River Railroad Company was incorporated under a private act, Laws 1846, ch. 216, and permitted to charge 2½ cents (§ 17). Later, however, the general rate fixed at 3 cents under the first general railroad laws of 1848 and 1850 was held to apply to it and it was allowed to charge 3 cents. *Johnson* v. *Hudson River R. R.*, 49 N. Y. (1872) 455. The general rates as distinguished from the charter fares have, however, never been held to apply to the part of the line first known as the New York Central Railroad Company and running generally from Albany to Buffalo. When the Central and the Hudson companies were consolidated under Laws 1869, ch. 971, the New York Central Railroad was held to its bargain, although the Hudson River R. R. Co. was left untrammeled by other than the general rate-making power. The law provided in section 3:

> "SECTION 3. Upon the making and perfecting such agreement and act of consolidation as hereinbefore provided, and filing the same or a copy thereof in the office of the Secretary of State as aforesaid, the said corporations, parties thereto, shall be deemed and taken to be one corporation by the name provided in said agreement and act, but such

act of consolidation shall not release such new corporation from any of the restrictions, disabilities or duties of the several corporations so consolidated; *but nothing in this act contained shall allow any rate of fare for way passengers, greater than two cents per mile to be charged or taken over the track or tracks of that railroad now known as the New York Central Railroad Company; and the rate of fare for way passengers over the track or tracks now operated by the said New York Central Railroad Company shall continue to be two cents per mile and no more wherever it is now restricted to that rate of fare; but nothing herein contained shall apply to street railroads.*"

The jealousy with which the Legislature guarded this valuable concession by the railroads is further shown by the fact that when the rate-making power was fully established after the creation of the original State Railroad Commission, the 2-cent fare was expressly excluded from rate-making by an exception contained in section 37 of the Railroad Law of 1890 and later contained in § 57 of the present Railroad Law as follows:

"This chapter shall not be construed to allow any rate of fare for way passengers greater than two cents per mile to be charged or taken over the track or tracks of the railroad known as the New York Central Railroad Company, and the rate of fare for way passengers over the track or tracks of such company shall continue to be two cents per mile and no more, whenever it is restricted to that rate of fare, nor shall any consolidated railroad corporation charge a higher

rate of fare per passenger per mile upon any part or portion of the consolidated line than was allowed by law to be charged by each existing corporation thereon previous to such consolidation." (Derived from Laws 1890, ch. 565, § 37.)

The Public Service Commission properly claims that power has been delegated to it to waive the State's right to the two-cent fare and that the Commission has the positive duty to increase the fare if it is insufficient. (See Laws of 1921, ch. 134, § 49, sub. 1 *supra.*)

Going back to the period of the Civil War, we find that the railroad in a period of economic stress almost equal to the present, cried out against its bargain for a two-cent fare. No judicial power was invoked to set aside the fare upon the ground that it was merely a noncompensatory rate.

Instead the railroad applied to the other party to the contract to increase the fare by a special law waiving the State's right to the sum "nominated in the bond." Governor Fenton vetoed the bill passed by both houses and said in part (Governor's Messages, April 28, 1865, Vol. 5, p. 659):

> "When the law to consolidate the several railroads connecting the cities of Albany and Buffalo was projected, its passage was urged because it would largely facilitate the transit of passengers and freight between the west and the commercial metropolis. The argument in favor of the measure was confined almost exclusively to the supposed advantages which would accrue to the public, and to the people of the State, from the reduced cost necessarily resulting from unity of management.

An examination of the various acts shows that the legislation of the State has been greatly influenced by the considerations which were urged in favor of the act of consolidation.

The charters of some of the roads first authorized, contained provisions which restrained them from carrying freight of any kind. The alleged necessity of protecting the State revenues by preventing competition with the Erie Canal, was the published justification of these restrictions. A few years of experience, however, clearly demonstrated the error of this position. It came to be understood that a decrease of the revenues of the State canals might be the less of two evils, and that enhanced values of real estate could be more safely relied upon as a resource from which the expenses of the government should be derived, than the uncertain and limited receipts resulting from the imposition of tolls upon commercial articles in transit between the consumer and the producer.

In accordance with the teachings of experience, and in response to the demands of the people, the Legislature has, from time to time, removed the restrictions which virtually gave the Erie canal a monopoly of the business of transmitting merchandise and produce. By the provisions of chapter 335 of the Laws of 1844, the Utica and Schenectady railroad company was authorized to transport 'goods, chattels and other property that may be offered for transportation, during the suspension of canal navigation only,' and 'shall pay to the Commissioners of the Canal Fund, the same tolls per mile, on all the goods, chattels and other property so transmitted as would have been paid on them had they been transported on the Erie

Canal.' The same act which thus removed the prohibition to carry freight, provided that the railroads west from the terminus of the Utica and Schenectady railroad should have the privilege of carrying local freight, without being subjected to the payment of tolls. By the provisions of chapter 270, Laws of 1847, the 'Utica and Schenectady railroad company, are authorized to take and transport upon their railway all goods, chattels and other property that may be offered for transportation,' and by the same act, the same privileges were given to the connecting roads — thus yielding the right to carry freight throughout the entire year, upon the condition that such freight should pay to the State the same tolls to which they would have been subjected had they been transported on the canal.

By the provisions of chapter 497 of the Laws of 1851, the Legislature provided that 'It shall not be necessary for any railroad company in this State to pay any sums of money into the treasury of this State, on account of the transportation of property on any railroad on and after the 1st day of December, in the year 1851, thus finally removing all restrictions upon internal commerce, and in obedience to the demand of trade permitted this withdrawal from the revenues of the canals that the people might enjoy the benefits of cheap intercommunication. The process by which this result was attained, was gradual but sure, and shows plainly that those who, from time to time, gave these measures their official sanction, were actuated by a sincere and enlightened determination to secure to the people all the advantages possible to be derived from cheap and rapid transit.

The Legislature of 1853, following the established precedents,—and apparently prompted by the same motives which had marked the actions of their predecessors, removed the obstacle which stood in the way of a full realizaton of the benefits to be derived from the policy previously declared. By consolidating the several corporations, it secured the advantage of centralized direction. In consideration of this final and advantageous concession, the Legislature of 1853, only exacted that ' when two or more of the railroad companies named in this act are so consolidated, said consolidated company shall carry way passengers on their road at a rate not to exceed two cents per mile.' In making this restriction, the Legislature adhered to the policy of the State as previously expressed and secured the same by positive enactment — while it removed every form of restriction which could enhance the cost of transportation, it protected the rights of the public, by limiting the price which should be exacted.

By the provisions of the act herewith returned, it is sought to reverse the legislation of 1853; to change the policy which seems to have been developed by previous legislation and to impose a higher rate of fare upon the people who may find it necessary to pass over this line of the Central Company.

* * * * * * *

Should the enhanced prices complained of continue to prevail and the managers be thereby forced to forego the declaration of a dividend, the stockholders would not then be called to endure a burden more oppressive than has been sustained by many corporations which have not had relief extended to them by legislative enactment. But it is improbable that such enhanced values should

long prevail. The rebellion has been substantially crushed; order is being rapidly restored, and in a short time the country will be again blessed with peace. With its return it is safe to assume that there will be an increase in the number of laborers and a decrease in the cost of material. The west will continue to be the great producing country of the world. Emigration will continue to people its hills and valleys. Our commerce will again cover every sea. A large proportion of this commerce and the thousands that will come from Europe, must or will pass over this great central route, and this corporation more than any other, must share in the prosperity to which our country is destined. Let us patiently await the fulfillment of that destiny, in the confident trust, that in a short time, the prosperity of the company will be secured without further burdens upon the traveling public. If experience shall not prove the embarrassments under which it is said to labor, to be but of a temporary character; and if the proposed reforms in its future management shall not secure to capital an ample recompense, I shall then be most willing to co-operate with the Legislature in affording such relief as may be wise and necessary."

The bill was not passed over his veto. At the session of 1867 he again vetoed a bill to raise the fare to 2½ cents, giving substantially the same reasons. This bill was not passed over the veto. (Governor's Messages, April 11, 1867, Vol. 5, pages 802–809.)

And so it has remained until the present. Neither party to the contract has ever admitted or contended that the two-cent fare was based on the rate-making power. After a fare was fixed in

the charters no lower fare was ever imposed. The two-cent fare came into effect by consent of the railroad and agreement with the State. Through all the difficulties of hard times and increasing prices that from time to time marked the period of 1855–1917, no attempt has ever been made to attack the agreement as noncompensatory, nor has the agreement been modified by general or private law, administrative bodies exercising delegated powers or until this case, by judicial decree. The fare was only changed temporarily under the undoubted power of the Federal Government during the war.

The charter contract is saved from Federal interference.

From the foregoing we think we have established that the two-cent fare is part of the consideration of a charter contract. It has always been so interpreted by the parties to it.

This consolidation charter is a contract under the modern authority of *Cleveland* v. *Cleveland City Ry. Co.*, 194 U. S. 517. There street railways were consolidated under a statute substantially the same as sec. 7 of L. 1853, ch. 76. The Ohio statute provided:

> "Such street railroad companies may consolidate on the terms and conditions applicable to consolidation of railroad companies; *provided, however, no increase of fare shall be allowed on any street railroad route by reason of such consolidation.*" (Margin, page 534.)

This was a restriction on the railway company, similar to the maximum of two cents agreed to by the appellant here.

When the city of Cleveland, under a claim of right conferred by the reserved power, attempted to reduce the existing fare of five cents a ride to four cents, the Supreme Court held that there was an impairment of a contract. The case here is no different except that the State now claims its part of the contract.

That these charters will be upheld at the instance of the government making them has recently been decided in a case where war time conditions were alleged to be working confiscation.

In *Columbus Ry. & Power Co.* v. *Columbus*, 249 U. S. 399, the railway company sought to be relieved in equity from a similar charter contract; this time the complaint was that the maximum fare was not sufficient to meet the expenses caused by the war, rather than that the municipality had sought to break the bargain. The Court discusses fully the effect of the rule "Act of God or the public enemy" in such cases and denies the railway any relief. It says:

> "It certainly was not intended to question the principle frequently declared in the decisions of this court that if a party charge himself with an obligation possible to be performed he must abide by it, unless performance is rendered impossible by the act of God, the law or the other party." (Page 412.)

See the most recent authority *City of San Antonio* v. *San Antonio P. S. Co.*, and *Southern Iowa Electric Co.* v. *City of Chariton*, decided April 11, 1921.

Mr. Justice Holmes in *Brooks-Scanlon Co.* v.

R. R. Comm., 251 U. S. 396, said by way of dictum:

> "It is true that if a railroad continues to exercise the power conferred upon it by charter from a State, the State may require it to fulfill an obligation imposed by its charter, *even though the fulfillment in that particular may cause a loss.*" (Page 399.)

Somewhat more specifically the Supreme Court says in *Grand Rapids & Indiana Ry. Co.* v. *Osborn*, 193 U. S. 7, 29–30:

> "That a railroad corporation may contract with a municipality or with a State to operate a railway at agreed rates of fare is unquestionable. And where the provisions of an accepted statute respecting rates to be charged for transportation are plain and unambiguous, and do not contravene public policy or positive rules of law, it is clear that a railroad company cannot avail of privileges which have been produced upon stipulated conditions and repudiate performance of the latter at will. Whether if a condition in a statute is couched in ambiguous language and is susceptible of two constructions, as it is claimed in the case before us in respect to the basis upon which the gross receipts per mile of operated road were to be calculated, a construction should be adopted which will not render the condition repugnant to the Constitution of the United States, we need not determine. The statute in question, in its entirety, has been construed by the Supreme Court of Michigan and held valid, and its decision as to the proper interpretation of the language of the act in respect to the mode of ascertaining the

> gross receipts per mile does not render the statute repugnant to the Constitution of the United States, within the ruling recently made by this court in *Wisconsin & Michigan Railway Company* v. *Powers*, 191 U. S. 379."

See also *Matter of Quimby* v. *Public Service Commission*, 223 N. Y. 24; *Norfolk, etc., R. Co.* v. *Pendleton*, 156 U. S. 667; also Lawyers Reports Annotated 1915 C, page 261, where other cases are collected.

Much of the authority cited in support of our position at this point may be applied in another way where we later urge that the power of a State to create a corporation may not be destroyed by Congress.

Yet, treating the question now strictly as one of property, it is worth while to determine whether Congress should be charged with having impaired this charter contract and whether Congress has power to do so.

The purpose of Congress to violate this contract should not be implied or derived. So amazing a charge should be sustained by the most direct and unmistakable language in the Federal statutes.

Passing from purpose and intention to power, we submit that Congress may not forever destroy the rights of the State in a contract, under an unlimited and interminable exercise of its war powers.

There are dicta to the general effect that Congress may impair the obligations of contracts, because at the time of the adoption of the Constitution only the States were specially restrained and Congress was not.

"*Sinking Fund Cases*, (1878), 99 U. S. 718. See also *Mitchell* v. *Clark*, (1884), 110 U. S. 643; *Legal Tender Cases*, (1870), 12 Wall U. S. 529; *Evans-Snider-Buel Co.* v. *McFadden*, (C. C. A. 1900), 105 Fed. Rep. 297; *Michigan Cent. R. R. Co.* v. *Slack*, (1876) 22 Int. Rev. Rec. 337, 17 Fed. Cas. No. 9, 527a, affirmed *Michigan Cent. R. Co.* v. *Slack*, (1879) 100 U. S. 595; *Evans* v. *Eaton*, (1816), Pet. (C. C.) 322, 8 Fed. Cas. No. 4,559; *Bloomer* v. *Stolley*, (1850) 5 McLean (U. S.) 158, 3 Fed. Cas. No. 1,559; *Hardeman* v. *Downer*, (1869) 39 Ga. 425; *Jones* v. *Harker*, (1867) 37 Ga. 503; *Black* v. *Lusk*, (1873) 69 Ill. 70."

On the other hand the contrary has just as strongly been said.

Hepburn v. *Griswold*, 8 Wall. 603, 623.
Sinking Fund Cases, 99 U. S. 700, 718–719.
St. Anthony Falls Water Power Co. v. *St. Paul Water Commissioners*, 168 U. S. 372.
Legal Tender Cases, 2 Wall. 457 at 581.
Loan Association v. *Topeka*, 20 Wall. 655 at 663–664.
Fletcher v. *Peck*, 6 Cranch 87.

Madison had denounced such laws as "contrary to the first principles of the social compact and every principle of sound legislation," *Planters Bank* v. *Sharp*, 6 How. 301, 319. One reason why the states had been specially restricted in Article 10 was because of outrages upon aliens and because the impairment of agreements with the British Government had endangered international relations, Elliott, Vol. 5, pp. 127, 171,

207, 546. The convention had rejected Mr. Gerry's resolution made on September 14th, to put a like prohibition on Congress.

Yet this does not necessarily mean that authority had been delegated to the Nation to commit an act *malum in se* and that National honor restrained only local greed.

If the prohibition on Congress does not rest upon first principles, the 5th amendment with the expanded interpretation of "due process" is now a sufficient restraint.

Due process in the 5th and 14th Amendments has come to mean the same thing. *United States* v. *Armstrong*, 265 Fed. 683, 690, and now protects all property against both the states and the United States. See particularly the dissenting opinion in *Wight* v. *Davidson*, 181 U. S. 371, at 387.

The State is a person under the analogy of the decisions that a private or municipal corporation is a person. The charter contract was made upon behalf of all the people and all the citizens of the State. Their interest represented by the State is entitled to the protection of the Constitution. It is expressly pleaded at page 18 that the State pays out money each year for the railroad fares of its officers and employees, thus giving the State a real property interest in the charter fare, as was recognized in regard to telephones used by a State in *Dakota Central Telephone Co.* v. *State of South Dakota*, 250 U. S. 163 at 180.

In one of the first great contract cases, *Fletcher* v. *Peck*, 6 Cranch 87, it was held that the contract clause applies to the states themselves and forbids the impairment of their own contracts, as

well as those of other persons, whether executory or executed. It seems there is a reciprocal obligation under any proper conception of property. What the State may not do itself it ought not to be made to suffer. Certainly the State's right to recourse to the Federal Courts under the constitution is significant.

Where learned justices have, as we submit, with lack of vision as to the development of due process, said that Congress could violate contracts, this was nowhere necessary to the decision of the case.

Even though the State's right in this charter is not based upon property, its right should be recognized in its power.

Aside from any property interest the State may have in this charter, the *power* of the State to regulate rates springs generally from its police power over common carriers, whether corporate creatures or not. "Inherently the power of a State to fix rates to be charged for intrastate carriage or transmission is in its nature but derivative, since it arises from and depends upon the duty of those engaged in intrastate commerce to charge only reasonable rates for the services by them rendered and the authority of the State to exact a compliance with that duty." *Dakota Cent. Tel. Co.* v. *South Dakota*, 250 U. S. 163, 187. It has been said that this police power is exclusive to the states, rather than concurrent with the Federal Government. *Cooke, Commerce Clause*, section 55. The earlier notion that the reserved

power over corporations expanded this power and permitted the imposition of unprofitable rates has been abandoned. *Lake Shore, etc., R. R. Co.* v. *Smith*, 173 U. S. 685.

Yet in addition to this power of the State to simply regulate, is the greater power to create or to refuse to create corporations under such terms and conditions as it may see fit. Although a corporation, after its creation, under the Federal Constitution is entitled to engage in interstate commerce, before its creation the State may impose conditions precedent, which if imposed as conditions subsequent might be violative of various provisions of the State or Federal Constitutions, as was the case in *Municipal Gas Co.* v. *Public Service Commission*, 225 N. Y. 93.

So in *Railroad Company* v. *Maryland*, 21 Wall. 456, the State was permitted to require as a condition of a charter grant, that the railroad should pay a bonus on its earnings from interstate as well as state business to the State of Maryland. See also *Horn Silver Co.* v. *New York*, 143 U. S. 305, 313; *Raritan Co.* v. *Delaware Canal Co.*, 18 N. J. E. 546. The State may, therefore, generally impose any condition in return for the grant of a charter.

This authority of the State is like the "fragment of legislative power" granted the municipalities under *Quimby* v. *Public Service Commission*, 223 N. Y. 244. The company cannot complain, because it is always free to renounce, *Osborne* v. *Florida*, 164 U. S. 650; *Pullman Company* v. *Kansas*, 216 U. S. 54. Congress has never attempted to control this power and the authority in Congress was expressly denied in *The Northern Securities Cases*, 193 U. S. 197.

The police power cannot be bargained away and when a State fixes a fare by a condition precedent in a charter or by a contract, it is therefore not exercising the police power, subject to its recognized limitations.

Although it may be impracticable for the railroad to abandon its corporate character and operate as a copartnership or otherwise, it is theoretically possible. On the other hand, if the burdens of its charter here are too great, it can seek incorporation as an interstate carrier under an act of Congress. The power of Congress to grant such a charter seems unquestionable. *California* v. *Central Pacific R. R. Co.*, 127 U. S. 1. Then it might become subject only to New York's police power. *Reagan* v. *The Mercantile Trust Co.*, 154 U. S. 413. Legal Possibilities of Federal Incorporation, 26 Yale Law Jour. 207; Right to Engage in Commerce, 8 Mich. L. Rev. 458; Federal Incorporation, 17 Mich. L. Rev. 64, 143, 238. For the present the benefits of the charter cannot be left to the railroad and its burdens removed by Congress throughout the life of the charter, under an assumption that there the railroad's business has expanded. *Paige* v. *Schenectady Ry.*, 178 N. Y. 102, 114. The power of the State to create corporations which may thereafter engage in interstate commerce is as fundamental as the power of the State to regulate foreign corporations doing business here.

The power of the State to create the New York Central and other roads mentioned in the pleading at fol. 80, as a corporation was reserved to it under the 10th Amendment. The Federal Government may not say, pursuant to an unlimited exercise of the war or commerce powers, what the

status of the company shall be after the emergency shall pass. This would in a sense be an exercise of the power of eminent domain. *Monongahela Co.* v. *United States*, 148 U. S. 313, depending upon whether the State's right in the contract is considered one of property or one of power. See *International Bridge Co.* v. *N. Y.*, 254 U. S. 126; *Erie R. R. Co.* v. *Commissioners*, 254 U. S. 394 upon the power the State itself may exercise over a charter.

POINT VI.

The special situation of the Long Island and Staten Island Railroads and other roads situated entirely within the State.

As to the Long Island Railroad and other roads of the same class the application of the principles above outlined naturally falls into two categories.

First, there is the question of the alleged discrimination between interstate and intrastate rates on the railroad itself, i. e., whether, by reason of the fact that purchasers of interline tickets good over the lines now have to pay 3.6 cents per mile instead of 3 cents per mile, there arises such a discrimination that the Federal authorities are justified in interfering.

Second, there is the question of the alleged discrimination between the intrastate rates on the lines as compared with similar rates on similar traffic interstate to the common point, Manhattan Island, from points in New Jersey and Connecticut.

There is no discrimination between interstate and intrastate traffic on the railroads which

would justify the interference of the Interstate Commerce Commission.

In the first place, they do no interstate passenger business in any practical sense of the term.

As is indicated by any authoritative map of New York City, Queens borough is served by three railroads and several systems of trolley lines. The three railroads are the Long Island Railroad, the Brooklyn Rapid Transit Railroad and the Interborough Rapid Transit Railroad.

The Long Island runs on a private right of way in the main, while the other two roads run main y over or under public highways.

The principal business of all three roads in New York City is the carrying of passengers to and from work and pleasure in the heart of New York. They all three compete directly for the commuting and local business of the territory served. None of them carry any passengers outside of New York State.

The Interborough Railroad has stations at the terminals of the following interstate railroads: The Hudson and Manhattan Company, the Pennsylvania Railroad, the New York Central Railroad, the New York, New Haven and Hartford Railroad, and the New York, Westchester and Boston Railroad. The Long Island Railroad has one of its terminals in Pennsylvania Station and connects there and at three other points — Flatbush Avenue, Woodside and Hunterspoint Avenue — with the Interborough Rapid Transit Company, while the Brooklyn Rapid Transit Railroad connects twice with the lines of the Hudson and

Manhattan Companies and at numerous points with the lines of the Interborough Rapid Transit Company, which, in turn, connects with interstate railroads at the points above mentioned.

No doubt many passengers on all three railroads, particularly the Interborough, transfer at these connecting points to interstate carriers, but the amount of such traffic is not ascertainable and is at any rate only incidental to the main business of these roads, which is intrastate commuting business from the suburban sections of New York City to the heart of the city. It is not directly claimed that this sort of traffic constitutes the supposed interstate business of the Long Island.

The Long Island Railroad, by arrangement with other railroads, claims to stand ready to sell interline tickets, but the sale of such tickets has been negligible except during the war period when troop movements were heavy between camps on Long Island and other points throughout the country, was and is negligible.

The only statement by the railroad in regard to the amount of its interstate business is found in the affidavit of Peter H. Woodward that "about twenty per cent of the gross revenue of The Long Island Railroad Company is derived from interstate transportation."

No figures are given as to the amount or proportion of interstate freight or passenger traffic separately. As Justice Benedict states in his opinion "The company could have furnished them but it has not done so." 113 Misc. 700 *supra.*

This by itself is almost sufficient proof of the negligible character of the interstate passenger

traffic which alone is in question here as it was in *Illinois Central R. R.* v. *P. U. C.*, 245 U. S. 493.

In corroboration of these figures we have the testimony of the witness Adikes, who has lived in Jamaica since 1855, and been interested in transit problems in Queens since 1880. He said (pp. 170-171):

> "Q. In your own residence on Long Island, and your large acquaintance there, have you ever known of any person buying an interstate ticket on the Long Island Railroad to a point outside of the State?
>
> A. I do not know of anybody.
>
> Q. Would you say from your knowledge of the habits of the people in Queens County, that it is or is not a custom for any large proportion of those inhabitants to buy interstate tickets on Long Island, for journeys outside of the State?
>
> A. Well, I travel considerable myself and my family too, and I have never heard of them, or I have never heard of tickets being sold, or a custom made of tickets being sold at the Long Island depot for stations beyond the State of New York."

When a man who has lived in Queens 65 years and has been a considerable traveller, *never even heard* that the Long Island sells such tickets, there is not much reasonable possibility that a change in their cost would affect the sale of them.

So that it may be said finally and conclusively that the interline business on the Long Island is negligible even without any deduction for that part of the interline business that does not go outside of New York State.

The total elimination of such a negligible amount of interstate business would not warrant the interference of the Interstate Commerce Commission. It is well settled that discrimination must be substantial and material to warrant Federal interference and the appropriate proof of substantial discrimination is loss of business thereby.

This was the very reason underlying the reversal of the Commission's order in the *Illinois* case (*Illinois C. R. Co.* v. *P. U. C.*, 245 U. S. 493), the Court saying (p. 507):

> "There is no finding that this traffic *extends in appreciable volume* to all sections of Illinois. *As to some sections its volume may be very large and as to others almost or quite negligible.* At best the reports (of the Commission) leave the matter uncertain."

The very words "undue" and "unreasonable" import this essential factor. This is emphasized in

> *Interstate C. C.* v. *Baltimore & O. R. R.*, 145 U. S. 263.

Also in the *Second Employer's Liability* cases, 223 U. S. 1, the Court, in analyzing and defining the power of the Federal Government under the commerce clause, said (p. 47):

> "This power * * * extends incidentally to every instrument and agent by which such commerce is carried on, may be exerted to its utmost extent over every part of such commerce and is subject to no limitations

> save such as are prescribed in the Constitution. But of course it does not extend to any matter or thing which does not *have a real or substantial relation to some part of such commerce.*"

And the recent cases of the *Covington-Cincinnati Street Railway* (*supra*) emphasize the same, saying as to the very severe statute in that case (p. 469):

> "The regulation of the act affects interstate business only incidentally and does not subject it to unreasonable demands."

Under these decisions the normal volume of interline business on the Long Island is negligible and would not warrant any action by the Commission. Moreover, there is in this case no scintilla of evidence that even the smallest portion of this negligible so-called interstate business has been adversely affected in the least. The interstate rates were increased on August 26, 1920. The railroad's affidavits in this case were submitted on December 11, 1920. Certainly if, in the three and a half months which elapsed while the higher interstate rates were in effect, there was any diminution in the sale of interstate tickets on the Long Island, it would have so stated in its opposition to this injunction. But not one word do we find in regard to it.

Yet such proof is absolutely necessary as a preliminary to the order of the Commission. There must be proof that there is a diminution of traffic and, as was said in *Minnesota Rate* cases (*supra*, p. 390), the loss must be shown to have been the

" necessary, immediate and direct effect " of the change of rates.

Such proof was present in every case prior to the present where the power of the Commission was successfully invoked.

For instance, in the *Illinois* case, when it was before this Commission,

> *Business Men's League of St. Louis* v. *Atchison, T. & S. F. Ry. Co.*, 41 I. C. C. 13, 19,

the facts were stated in the report as follows:

> " The fare between St. Louis and Chicago before July 1, 1907, was $7.50. From that date to December 1, 1914, $5.80, and it is now $7.50. The fare between East St. Louis and Chicago has been $5.62 for about 9 years, so that whereas there existed a difference in fare as between the two cities of 18 cents, that difference is now $1.88. *As a consequence* of this disparity in fares, large numbers of passengers from St. Louis to Illinois points purchase tickets from St. Louis to East St. Louis for 25 cents, there they buy tickets from East St. Louis to their destinations in Illinois at the fares whose maximum is fixed at 2 cents a mile by the Illinois Legislature."

The Commission went on to give figures of the large increase in the sale of bridge tickets between St. Louis and East St. Louis and the large decrease in the sale of interstate tickets between St. Louis and points in Illinois, that appeared in comparing sales for the period just before and just after the increase in interstate rates.

Indeed, in one of the most recent of the cases following the decision herein,

> *Wisconsin Passenger Fares,* 59 ICC. 391,

the Commission itself notes in its report certain facts which justified its action as to intrastate rates in that state, saying (p. 394):

> "As tending to show undue preference of or prejudice to localities, and that the through interstate fares are being defeated, respondents introduced an exhibit from which it appears that during the period August 1 to 14, 1920, inclusive, 1,367 tickets were sold from Marinette, Wis., to 12 stations in Wisconsin on The Chicago & North Western, while during the same period in September 2,021 tickets were sold, an increase of 47.7 per cent. During the same periods 479 and 357 tickets, respectively, were sold from Menominee, Mich., to the same stations, a decrease of 25.4 per cent. Marinette and Menominee are on opposite sides of the Menominee River. From Hurley, Wis., to 10 stations in Wisconsin on the Chicago & North Western, 713 tickets were sold during the period August 1 to 14, 1920, inclusive, and 964 during the corresponding period in September, an increase of 35.2 per cent. From Ironwood, Mich., a point directly opposite Hurley, to the same stations, 953 tickets were sold during the August period and 601 during the September period a decrease of 36.9 per cent. During the period August 1 to 21, 1920, inclusive, the tickets sold and cash fares collected between Ashland, Wis., and Duluth, Minn., and between Ashland and Superior, Wis., were 1,624

and 842 respectively. During the same period in September the figures were 1,280 and 1,152 respectively.

"A direct result of the practice of buying passenger tickets again at or near state lines, thereby defeating the through interstate fares, is to convert, so far as the revenues of the carriers are concerned, interstate commerce into intrastate commerce. It also results, where there are two or more routes between two given points, in passengers using the route which has the longest mileage within the state carrying the lower intrastate fare. For example, a passenger from Milwaukee to St. Paul on the Chicago & North Western can purchase an intrastate ticket to Hudson, Wis., for $9.14 and an interstate ticket from Hudson to St. Paul for 70 cents, a total of $9.84. The passenger on the Chicago, Milwaukee & St. Paul, who desires to pursue a like practice will purchase an intrastate ticket to La Crosse, Wis., for $5.91 and an interstate ticket from La Crosse to St. Paul for $4.77, a total of $10.68, or 84 cents higher than the combination via the Chicago & North Western. The through interstate fare from Milwaukee to St. Paul, via both routes is $11.67."

This is consonant with the proof always considered necessary to justify such interference.

In the *Long Island* case not only is there no proof such as this but everything points to the conclusion that no proof could be adduced that would show substantial discrimination.

As to the Staten Island Company the case is even worse.

There is no evidence as to the amount of interstate passenger business nor is there any evi-

dence that there has been any diminution of such business by reason of the increase of rates.

It also appears that the Staten Island did not join in the petition to the Interstate Commerce Commission which resulted in the order relied on and that no proof whatever was offered in regard to its operations in the hearings which preceded the order.

The railroads cannot claim that every passenger who leaves New York State after traveling on their lines is an interstate passenger while on their lines.

In *Gulf C. & S. F. Ry. Co.* v. *Texas,* 204 U. S. 403, certain corn had been shipped from Hudson, So. Dakota, to Texarkana, Texas. There it remained five days, passing into the ownership of a resident of that city. He then shipped it in the same cars to Goldthwaite, Texas. The Court decided that in the journey from Texarkana to Goldthwaite, Texas, it was in intrastate, not interstate commerce. In the course of the opinion the Court said (p. 413):

> "In this respect there is no difference between an interstate passenger and an interstate transportation. If Hardin, for instance, had purchased at Hudson, a ticket for interstate carriage to Texarkana, *intending all the while* after he reached Texarkana to go on to Goldthwaite, he would not be entitled on his arrival at Texarkana to a new ticket from Texarkana to Goldthwaite at the proportionate fraction of the rate prescribed for carriage from Hudson to Goldthwaite. The one contract of the railroad companies having been finished, he must

make a new contract for his carriage to Goldthwaite and that would be subject to the law of the State within which that carriage was to be made."

This case was distinguished at some length in

Ohio R. R. Comm. v. *Worthington*, 225 U. S. 101.

which was a case involving coal shipped to ships in Huron, Ohio, on which ships, as the Court said (p. 108), it was "necessarily" shipped to points outside the State.

It was further distinguished in the similar freight cases of

Texas and N. O. R. R. Co. v. *Sabine Tram. Co.*, 227 U. S. 111;
Louisiana R. R. Comm. v. *Texas & P. Ry.*, 229 U. S. 336.

But it has never been overruled and is cited with approval by Justice Hughes in

Chicago M. & St. P. Ry. v. *Iowa*, 233 U. S. 334,

as well as by Justice Vandeventer in

Pa. R. R. Co. v. *Mitchell Coal & Coke Co.*, 238 U. S. 251.

The distinction in all cases seems to be that the mere fact that there are two tickets or bills of lading, one interstate and one intrastate, does not conclude the inquiry. It does not prove the commerce to be intrastate. *A fortiori*, it does not prove it to be interstate.

The only rule is that the decision must rest upon the facts of the case in question.

Thus in *Pacific Co.* v. *Arizona,* 249 U. S. 236, a travelling show was held to be in intrastate commerce, though it was the intention of its manager to continue on to another State and he had written for transportation which he had not received when the question arose.

In *Public Utilities Commission* v. *Landon,* 249 U. S. 236, natural gas sold by local companies was held to be subject to State regulation though it came from without the State. The Court said (p. 245):

> "Interstate commerce is a practical conception and what falls within it must be determined upon consideration of established facts and known commercial methods."

Similarly in *Arkadelphia Co.* v. *St. Louis S. W. Ry. Co.* (*supra*), it was held that rough wood brought intrastate to be milled with the intention of shipping 95 per cent. of it out of the state was not in interstate commerce until it left the mill.

The question depends, of course, upon when the subject actually enters upon its interstate journey. It is said in *Illinois C. R. Co.* v. *Fuentes, etc.,* 236 U. S. 67:

> "When freight actually starts in the course of transportation from one state to another it becomes a part of interstate commerce."

That is the question brought up by the possible claim of the railroad company that all passengers who intend to go outside the state are in interstate commerce, even though riding on a local

ticket good only in New York. But this is obviously unsound, for if it be true, then the Interborough Rapid Transit Railroad and the Brooklyn Rapid Transit Railroad are many times as great carriers of interstate passengers as are defendants. For of the Long Island passengers who intend to go out of the State, only the limited number who come into Pennsylvania Station from the East and go out of the Pennsylvania to the West, can avoid using the rapid transit lines on part of their journey. The rapid transit railroads, on the other hand, connect with all railroads except the Central Railroad of New Jersey, and the West Shore, either directly or by connection with the Hudson and Manhattan lines.

It can hardly be seriously contended that those who ride on the subway to their trunk line terminal for a journey without the State, are in interstate commerce as soon as they enter the subway. Yet the allowance of such a contention would involve just this.

The distinction seems to lie in the construction to be given to the words "when" a person "actually starts in the course of transportation from one state to another" (*Illinois C. R. Co.* v. *Fuentes*, 236 U. S. 67). Sentimentally speaking, he "actually starts" when he kisses his loved ones good-bye and leaves his house either on foot or to enter some sort of conveyance. This, however, cannot be the meaning intended. No one could consider that Congress had the right to regulate taxicabs in Jamaica, Long Island, because some people take them from their home to the station of the subway, when about to start on an interstate journey.

Similarly, a trolley car would not be considered an interstate carrier, though used for the same purpose.

The real test seems to be, when in the ordinary course of human reasoning the person involved considers himself actually and irrevocably started on his journey. This to the suburbanite is only when he enters the train at a trunk line terminal in New York or New Jersey.

For instance, suppose a man residing in Flushing, New York, desires to leave at midnight from the Grand Central Terminal. He may get there by any one of four ways. If there is a convenient train he may go by the Long Island to Woodside, or Pennsylvania Station, and from there by subway. This will cost him from 15 to 33 cents, depending on what kind of ticket he uses — commutation, 50-trip or one-way. He may take two city buses to the subway at Corona and go from there direct to Grand Central, at a cost of 15 cents. He may take a trolley to the same subway and arrive at Grand Central, at a cost of 10 cents, or he may take a trolley to 59th Street and 2d Avenue, New York, and walk to Grand Central at a cost of 5 cents. Of which means he will avail himself to get to Grand Central, depends upon his parsimony and the time at his disposal. But in any case all are put in the same category. All are methods to get to the place, where in a real business sense, he will start on his interstate journey.

The reasoning which moved the Supreme Court in *Coe* v. *Errol*, 116 U. S. 517, to hold taxable by a state certain logs which, while intended for shipment without the State, had only been brought to

the shipping point, is particularly apposite. The Court said (p. 528):

> "It is true, it was said in the case of The Daniel Ball, 10 Wall. 557, 565: 'Whenever a commodity has begun to move as an article of trade from one State to another commerce in that commodity between the States has commenced.' But this movement does not begin until the articles have been shipped or started for transportation from one State to the other. The carrying of them in carts or other vehicles, or even floating them, to the depot of that journey is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another State or committed to a common carrier for transportation to such State, its destination is not fixed or certain. It may be sold or otherwise disposed of within the State, and never put in course of transportation out of the State. Carrying it from the farm or the forest, to the depot, is only an interior movement of the property, entirely within the State for the purpose, it is true, but only for the purpose, of putting it in the course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the State its exportation is a matter altogether in fieri and not at all a fixed and certain thing."

The case is even stronger here. For in the case of logs intended for shipment we can tell just which they are. But who can look into the minds of the millions of commuters on the Long Island, Staten Island, the Interborough or the B. R. T.

and tell how many are going to board another train after leaving the one they are in to continue their journey perhaps to Jersey City? It is obviously impossible to tell who they are, how many they are or what kind of tickets they ride on. It follows, therefore, that the only possible way to make every one in New York who desires to go without the State pay the interstate rate of 3.6 cents per mile would be to abolish all local tickets, all 50-trip tickets, all commutation tickets and raise the fare on the subways to 3.6 per mile.

There was no ground for action by Commission in respect to local rates on the defendant railroads as compared with similar rates on the New Jersey roads, for the discrimination, instead of being in favor of Long Island, is actually in favor of New Jersey.

Commutation rates, including 50-trip rates, were excluded by the Interstate Commerce Commission because, as it says in its report:

> "The record discloses facts in the presence of which we can not presume that the existing structure is just and reasonable in its established relationships and that it should be adopted as the basis upon which a general advance should be authorized."

The meaning of this somewhat cryptic utterance is that the commutation and 50-trip rates on the Long Island Railroad are today higher than similar rates for similar distances than are the rates in New Jersey in spite of the 20 per cent. increase granted in those rates.

As to the one way and round trip rates the

situation is well summed up by the testimony of the witness Adikes, as follows (pp. 167-168):

> Q. Have you been interested in transit problems and civic problems in the Borough of Queens for a great many years? A. I have.
>
> Q. For how long? A. Since 1880.
>
> Q. And you have made a study of the conditions as they affect the people of Queens? A. I have.
>
> Q. During that time? A. To a certain extent.
>
> Q. You are a member of what civic organizations? A. I am a member of the Queens Chamber of Commerce, and Chairman of their transit committee; also Jamaica Board of Trade and chairman of their transit committee.
>
> Q. Did you make a study to some extent of the comparative rates between places on Long Island and places in New Jersey, prior to this 20 per cent increase granted on August 26th? A. I did, in Jersey and points in Queensboro.
>
> Q. Did you find that there were discriminations in favor of some portions of New Jersey, as against Long Island — some portions of Long Island? A. I did, from 40 to 100 per cent.
>
> Q. Where are the low rates in New Jersey? A. From Manhattan to Newark and to the towns adjacent to Newark.
>
> Q. That is, Newark is the central point which is a focus of numerous trolley lines? A. Yes, sir.
>
> Q. Since the increase was granted to the New Jersey Roads, have you had occasion to compare the rates charged by the Pennsylvania over its own lines, or over the lines

of the Hudson & Manhattan Railroad Company and the rates charged by the Long Island Railroad to points like Hunter's Point Avenue and Woodside, where it joins the city rapid transit system? A. I have.

Q. Is there still a discrimination in favor of New Jersey? A. There is still a discrimination of 20 to 80 per cent in favor of New Jersey.

He also testified that he had been active as a civic worker in the movement which resulted in the passage of Chapter 688 of the Laws of 1920, which aimed to do away with the discriminations against the Borough of Queens and that since August 26, 1920, as chairman of the Transit Committees of the Queensborough Chamber of Commerce and of the Jamaica Board of Trade he had filed a complaint with the Public Service Commission asking the enforcement of that law.

This testimony was not contradicted and stands unchallenged. So that instead of there being a discrimination in favor of Long Island against New Jersey, the discrimination is actually the other way. Instead of New Jersey "persons or localities" complaining that their rates are higher than those on Long Island we find the entire Borough of Queens as represented by two responsible commercial organizations complaining bitterly to the Legislature, to the Public Service Commission, to the Interstate Commerce Commission, and now to the courts that New Jersey has lower rates to New York than have the people on Long Island.

The Interstate Commerce Commission, therefore instead of taking such action as "in its

judgment will remove " the discrimination, has actually, in the face of uncontradicted evidence, attempted to increase the existing discrimination against intrastate traffic from points on Long Island to Manhattan.

Surely a more absurd abuse of the power to " foster and protect " interstate commerce could hardly be imagined.

As to the Staten Island Rapid Transit Company the case is perhaps even more absurd. As has been pointed out above, this railroad was not a party to the proceeding, before the Interstate Commission, it did not apply for an increase and absolutely no evidence was presented before the Commission or in this proceeding which would indicate that its rates are lower than the extremely low rates prevailing in the Metropolitan District between points in New Jersey and Manhattan Island.

Justice Brandeis, in the *South Dakota* case, *American Express Co.* v. *Caldwell* (244 U. S. 617), said (p. 624):

> " Proceedings to remove unjust discrimination are aimed directly *only at the relation of rates.*"

In every *Shreveport* case, so-called, the State rates, and the interstate rates had their respective well-defined levels, the State level being considerably higher than the interstate.

Moreover, it is conceded in this case that this is the issue here, and complainant's witness Hunter testified.

> " Q. There is no exception in your prayer for relief, or what you desire to accomplish by this proceeding or any similar proceeding

—no exception in favor of local fares at any less than 3.6? A. No, sir.

"Q. Without any regard to what local conditions may be? A. No; we think, Judge, that the rate fabric of the country, both intrastate and interstate, ought to be on a uniform basis, in order to eliminate all discriminations as between persons and localities. You cannot do it otherwise. There is no reason in the world why the people of the State of New York should be in a preferred class against those who live in the State of Pennsylvania."

And again:

"A. In other words, this is a revenue producing measure. It does not run, as I understand it, to the question of maximum rates or minimum rates or anything else.

"Q. Regardless of the justice of the present rates, you want the 20 per cent increase? A. Yes, that is the idea. I do not understand that question is in issue at all. At least that has been my understanding."

That is the question at issue here, whether the level of intrastate rates is lower than the level of interstate rates and there is obviously no basis laid for the decision of that issue.

On the Long Island Railroad itself the so-called interstate rates are imaginary and ephemeral to such a degree that any level they might have is purely academic. Local rates on the Long Island certainly have no level, even in any one class of rates.

As between the Long Island local rates and the New Jersey local rates, there can be no comparison of levels, for there is no level in either case.

In a broad sense perhaps it may be said that the Commission in

Ex Parte 74, 58 I. C. 220,

fixed upon the reasonableness of the local rates between New Jersey and New York. But in no real sense is this the fact. What the Commission actually did was to take such facts as were available, though they were not satisfactory to the Commission (pp. 228, 230) either as to value or earnings, and to fix the percentage of increase proper for all the railroads combined in the Eastern Group. There is no indication in the opinion in that case, and it is not believable that the Commission actually determined in that case that all of the local New Jersey rates, ranging as they do from 1½ cents to 5 cents per mile, were found to be reasonable.

Until this is done, of course, there is no basis for finding discrimination. And if this is held to have been done, certainly there would be no ground for alleging undue and unreasonable discrimination unless the level of the Long Island rates were lower than the lowest rates found reasonable for any considerable number of interstate travellers. As such lowest rates are considerably under 2 cents per mile, there was certainly no ground for interference here.

We have seen that in each of the *Shreveport* cases, so-called, there was either as an original complainant or an intervenor, some community complaining of loss of valuable commerce by reason of the changed relationship of rates.

This element of these cases was emphasized by Commissioner Clark in his testimony before the House Committee:

"This situation has been more or less troublesome. We have had a good many complaints of undue preference of State shippers and undue prejudice against interstate shippers. The Shreveport case was originally brought by order of the Legislature of the State of Louisiana on account of undue prejudice believed to exist against the shippers of Louisiana and undue preference of shippers in Texas under rates prescribed by the Texas Commission. Singularly enough, it was not very long until we had a complaint from Natchez, Miss., against the Louisiana rates prescribed by the Louisiana Commission. We have had several complaints from parties in Missouri against the Illinois rates and we have had complaints from parties in Illinois against the Missouri rates. We have had the same situation presented in New England and from various parts of the country. It comes from all sections of the country and it results from a difference in point of view of commissions in different State, although they may be adjoining" (Vol. I, House Committee Proceedings, pp. 26, 27).

He then goes on to speak of the many rival border cities from whom such complaints have or are apt to arise, such as:

East St. Louis	Illinois	and St. Louis, Missouri
Omaha,	Nebraska	and Council Bluffs, Iowa
Kansas City,	Kansas	and Kansas City, Missouri
Rock Island,	Illinois	and Davenport, Iowa
Bristol,	Tennessee	and Bristol, Virginia
Texarkana,	Texas	and Texarkana, Arkansas.

There always has been an aggregation of human beings to complain except in this case.

Here we have the New York Central complaining of what? Witness Vosburgh stated (p. 134):

> "I know that there has been considerable falling off in the traffic heretofore handled by the lines other than the New York Central, and it is my opinion that if this difference in fares should continue, with a difference of $2.25 in favor of the New York Central for a passenger in a sleeping car between New York and Buffalo, it will have the effect of diverting practically all of the business of the other lines to the New York Central."

Can the court imagine Commodore Vanderbilt complaining that conditions were such that the New York Central would probably get all of the business between New York and Albany at 3 cents per mile?

But of what did the Long Island complain? Nothing so far as can be ascertained except that the war is over and there are no troops to carry.

It is true that it has a right to complain technically (Sec. 13, par. 3, Transportation Act), but so had every citizen. No one, however, has a standing as a complainant unless he has something of which to complain. It may be a matter of regret to it that it can't raise its rates instanter, but that does not give it the right to complain without actual proof of damage by reason of discrimination.

The conclusion inevitably is that, though this complaint was made in the form of law on the ground of discrimination, it was not really based on discrimination, and that the real basis of the application is the desire to get an increase of rates without proving before the proper State

authorities the reasonableness of the application. In fact the reason behind this is actually to overthrow the irksome State authority and nothing else.

Justice Hughes said in the *Minnesota Rate* cases (*supra*), at page 402:

> *"Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the state appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power."*

How much more is this the case where there is no proof that the rates in question "have such a relation to interstate commerce as to be within the reach of Federal power"?

The case of purely local rates within the limits of a single city is eminently and evidently such a matter. Moreover, as we have seen in this case, Congress had neither the power to act nor has it acted.

New York is a city by itself, the largest in the world, and with the most acute problems of congestion and transportation. Its unique character is specifically recognized in the constitution of the New York regulatory bodies, one for railroads and one for rapid transit constructed by the city.

The fact that the City of New York has undertaken this tremendous engineering and governmental problem has a very direct bearing on the transportation problem in the Borough of Queens.

Witness Adikes pointed out that the city's rapid transit railroads parallel in some cases the Long Island tracks, and, in one case in particular, that the Long Island Railroad is successfully competing with the city-owned lines, though charging a higher fare. He testified (pp. 173-174):

> "Q. Now, from Jamaica to Flatbush Avenue, the Long Island has a local service? A. Has a local service.
>
> "Q. Do you know whether that was operated in competition with the service on the Brooklyn Rapid Transit lines? A. It was operated in the middle eighties to compete with the Brooklyn Rapid Transit lines.
>
> "Q. The fare was reduced for that purpose? A. Yes, sir.
>
> "Q. The fare today is 11 cents from Jamaica to Flatbush Avenue? A. Yes, sir.
>
> "Q. A distance of a little over nine miles? A. Yes.
>
> "Q. The fare on the city rapid transit lines from Jamaica to Brooklyn is 5 cents? A. Yes.
>
> "Q. The difference in fare does not keep the Long Island Railroad from filling its local trains, does it? A. No, their trains are loaded. In fact, they are overloaded on that division, which is a fact, and which would be relieved by them running the same service over their Long Island division to Long Island City or to Woodside."

He further testified that he had been endeavoring as a civic worker to have the Long Island Railroad establish a similar local service at a low fare to Woodside and Hunterspoint Avenue, where, as at Flatbush Avenue, Brooklyn, the

Long Island has a junction with the city rapid transit lines, and that Mr. Peters, president of the Long Island Railroad, had promised in 1909 to establish such a service, but had never done so.

This gives an insight into the peculiar and unique conditions which face the Long Island Railroad, and the absolute impossibility of establishing the fares on that road on the basis of those fixed for any other territory. The people of Queens, of course, believe that if competition with the city rapid transit lines is voluntarily established by the Long Island Railroad on one line and proves profitable, it should be forced to establish it on other similar lines where similar conditions exist.

This competition of the city rapid transit lines is so direct and affects so vitally the transportation situation in Queens, that it far outweighs any prejudice or advantage which might exist in favor of Queens and against New Jersey. If any parts of the Greater City of New York actually enjoy rates which are discriminatory against New Jersey, it is those parts in which the people are enabled to ride on the city rapid transit lines for a 5-cent fare to and from their work. *If New Jersey localities have a complaint against any New York communities, it is against those, not against those struggling communities in Queens who have to depend upon the Long Island Railroad and to pay its almost prohibitive fares.*

If the Long Island Railroad is not enabled or forced to meet the competition of the city-owned

lines, as it can do, it would mean that for the people of Queens, the Long Island Railroad would become a luxury instead of a convenience and would be maintained not for the benefit of the people at large, but for those few fortunate individuals who are able to pay exorbitant rates for added convenience.

It has not yet been contended formally that the establishment of the city-owned rapid transit lines is a discrimination against interstate traffic from New Jersey, which would warrant action by the Federal Government. Yet, we have seen that if there is an undue discrimination against New Jersey on the part of any section of New York City, it is owing to these transit lines. They, however, fall under the doctrine stated by Justice Hughes in *Minnesota Rate* cases, 230 U. S. 352, 416, as follows:

> "The doctrine was thus fully established that the State could not prescribe interstate rates but could for reasonable intrastate rates throughout its territory. The extension of railroad facilities has been accompanied at every step by the assertion of this authority on the part of the states and its invariable recognition by this court. It has never been doubted that the State could if it saw fit, build its own highways, canals and railroads (*R. R. Co.* v. *Maryland*, 21 Wall, 456, 470, 471). It could build railroads traversing the entire State and thus join its border cities and commercial centers by new highways of internal intercourse to be always available upon reasonable terms. Such provision for local traffic might indeed alter relative advantages in competition, and, by virtue of economic forces, those engaged in

> interstate trade and transportation might find it necessary to make readjustments extending from market to market through a wide system of influence; but such action of the State would not for that reason be regarded as creating a direct restraint upon interstate commerce and as thus transcending the state power."

The establishment of those roads was a provision of local foresight and the product of local taxation. That they should be removed, because New Jersey has not had similar foresight, is inconceivable. Yet, they might just as well be removed as to increase the fares upon them to a mileage rate equivalent to that charged on New Jersey commuting railroads, some of which, like the Pennsylvania and the Hudson and Manhattan, give precisely similar service.

The need of competition on the part of the Long Island Railroad with these lines is so evident as to need no further argument, particularly at this time when the problems of congestion and housing are so acute and when it is so necessary that everything should be done to spread the population of New York City over its outlying and vacant sections.

Thus the problem of rates on the Long Island Railroad within the City of New York is "peculiarly a local problem," such as was comprehended in the statement of Justice Hughes in the *Minnesota Rate* cases (*supra*), which we have quoted above, and the essence of the Long Island application in this case is to the effect that the Transportation Act has given to the Interstate Commerce Commission jurisdiction over this purely local matter.

To take such problems out of the hands of New York itself, would be the negation of popular local government, the acme of governmental centralization, the apotheosis of bureaucracy and the abolition of the last vestige of state rights. It has been loosely said that the sections of the Transportation Act under which this order was made were aimed at the elimination of the State regulatory bodies. We respectfully submit that if those sections permit the regulation of local rates in the City of New York by the authorities at Washington not only have the State regulatory bodies been shorn of their power but every State Statute, every State Constitution and the very theory and fabric of our Federal Government under our revered Constitution have all fallen in one mighty calamity.

It appears from the testimony that Chapter 868 of the Laws of 1920, State of New York, was enacted for the purpose of eliminating discriminations in rates on the Long Island Railroad against the citizens of Queens as compared with the citizens of New Jersey.

It further appears that since the 20 per cent. increase given the New Jersey roads by the Interstate Commerce Commission, a complaint has been filed with the Public Service Commission, First District, praying for the enforcement of that act.

It was said in *Stone* v. *Farmers Loan & Trust Co.* (*supra*), at page 334, that:

> "it would seem to be a matter of domestic concern to prevent the company from discriminating against persons and places in the State."

Under the law, railroads are entitled to a fair and adequate return upon the value of their property in the public service, and since the Long Island Railroad claims it is not getting such a return, it should prove its case before the Public Service Commission of this State, and get that to which it is entitled.

As appears in the evidence local fares on the Long Island from Jamaica to Flatbush avenue, nine miles, are 11 cents or at a rate of 1.1 cents per mile. Most rates on the Long Island, however, are 3 cents per mile. At Flatbush avenue, the Long Island connects with the city Rapid Transit lines. Recently the Woodside and Hunterspoint avenue stations of the Long Island have been connected with the city system.

The uncontradicted testimony is that the trains carrying passengers at 1 cent per mile between Jamaica and Flatbush avenue are crowded and that this is the most profitable division of the Long Island.

The endeavor on the part of the civic workers of Queens to have the same rates and service established to Woodside as to Flatbush avenue is not unreasonable and would undoubtedly be successful before the State regulatory authorities for as the Supreme Court says in the recent case of *Skinner & Eddy Corporation* v. *U. S.*, 249 U. S. 557, " low rates, because voluntarily established by the carriers " (as these rates were) " may be accepted by the Commission as evidence that other rates, actual or proposed, for comparable service are unreasonable high."

But if rates are to be fixed unalterably by the Interstate Commerce Commission, who will eradi-

cate such discriminations within a single State? Certainly the State cannot and neither can the Interstate Commission, for discriminations purely intrastate are not its affair.

POINT VII.

The Interstate Commerce Commission has unauthorizedly assumed the authority of an appellate tribunal to review the action of State Legislature and regulatory bodies.

That the Interstate Commission does without warrant of law so set itself up as an appellate tribunal is the inescapable conclusion from an examination of the report in this and the Illinois case.

Here the first recital in the report is that the railroads have applied to a Public Service Commission for relief, that it has been denied and that "thereafter the principal steam railroads serving the State of New York filed with us a petition for relief in accordance with the provisions of Section 13 of the Interstate Commerce Act."

This practically states that this is an appeal from the order of the State authority. The strange nature of the appellate jurisdiction claimed by the Interstate Commission cannot be better summed up than in the words of Commissioner Eastman's able dissenting opinion as follows:

> "In essence, the carriers' position is that when we authorize an increase in interstate rates under section 15-a of the interstate commerce act a corresponding increase must

be made in intrastate rates; otherwise unjust discrimination against interstate commerce results which it is our duty under section 13 to correct. State Commissions may be asked to authorize the intrastate increases, but they need be offered no evidence except the fact of our decision and have no real discretion."

"The record in the instant case is based upon and conforms to this general theory of our power, and it is the only theory, it seems to me, upon which the decision of the majority can in full measure be supported. I am unable to believe that it is sound."

If there could be appellate jurisdiction in the Interstate Commission, it assuredly could not be based upon a mere failure of the State authorities to do as to intrastate commerce precisely what the National body has done as to interstate commerce. Yet that is the claim made.

POINT VIII.

The order of the Interstate Commerce Commission is unlawful and unconstitutional on its face.

The rule of construction laid down by the Supreme Court in the Illinois passenger case, the last of the so-called Shreveport cases, must of course be the guide. There the Court said, 245 U. S. 493 at 510:

"In construing federal statutes enacted under the power conferred by the commerce clause of the Constitution, the rule is that it should never be held that Congress intends to supersede or suspend the exercise of the

> reserved powers of State, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested. *Reid* v. *Colorado*, 187 U. S. 137, 148; *Cummings* v. *Chicago*, 188 U. S. 410, 430; *Savage* v. *Jones*, 225 U. S. 501; *Missouri, Kansas & Texas Ry. Co.* v. *Harris*, 234 U. S. 412, 419. This being true of an act of Congress, it is obvious that an order of a subordinate agency, such as the Commission, should not be given precedence over a state rate statute otherwise valid, unless, and except so far as it conforms to a high standard of certainty." (*Illinois Central R. R.* v. *P. U. C.* 245 U. S. 493, 510.)

The order then must be strictly construed and we must search its provisions and the report of the Commission upon which it is based, to form an opinion upon its validity.

The Commission's report expressly admits that under these "Shreveport" cases, its power does not extend to all of the rates within New York State. It will be remembered that in the *Illinois Case* (*supra*), the Commission's order was declared invalid for indefiniteness. The language used by this court, is so nearly the exact language of the Commission's report here, that we respectfully call the Court's particular attention to it. The Supreme Court says:

> "The extent of the discrimination found and of the remedy applied, must be gathered from the report and order of the Commission, for they constitute the only authoritative evidence of its action. The reports show that the only discrimination found relates to the passenger traffic between Illinois and two cities outside that State — St. Louis and Keokuk. There is no *finding that this traffic*

extends in appreciable volume to all sections of Illinois. As to some sections its volume may be very large and as to others almost or quite negligible. At best the reports leave the matter uncertain. Obviously this traffic is only a small part of the interstate passenger traffic moving over the railroads in Illinois and yet the finding is merely that there was discrimination against this part. Had the Commission regarded the discrimination as state wide, it is but reasonable to believe that it would have said so in its finding." (*Illinois Central R. R.* v. *P. U. C.*, 245 U. S. 493, 507, 508.)

The report in this case says (p. 186, fol. 918):

> "*There may be cases in which intrastate rates affect interstate commerce injuriously in ways so manifest as to make them subject to our control. There may be cases in which the connection of intrastate rates with the movement of interstate commerce is so remote and unimportant that we may properly disregard it. But in every case which puts in question intrastate rates, the decisive factor is whether or not they affect interstate commerce injuriously to a considerable extent. If they do they are brought under our jurisdiction and made subject to our control even although the whole rate structure of a state should be involved.*"

And as a further evidence that no general statewide discrimination is found we have this astonishing provision (p. 191, fol. 942 of this Record):

> "Those findings are without prejudice to the right of the authorities of the State of New York or of any other interested party,

> to apply in the proper manner for a modification of our findings and order as to *any fares, charges or rates on the ground that the latter are not related to the interstate fares, charges, or rates in such a way as to contravene the provisions of the interstate commerce act.*"

In other words, " There may be cases in which the connection of intrastate rates with the movement of interstate commerce is so remote and unimportant " that they "do not contravene the provisions of the interstate commerce act." But regardless of whether there are such or not, the rates in those cases are raised with the others. Then if the Commission has exceeded its power, any interested party may apply to it to have it admit and correct this abuse on its part.

In the *Illinois Case* the order was invalid because it did not state that the discrimination was state wide. In this case it is even more clearly invalid, for though it raises all rates, it expressly states that many of them " may " not be " related to interstate fares, charges or rates in such a way as to contravene the provisions of the Interstate Commerce Act."

Plainly, if the Commission has exceeded its power as to one single rate covered by its blanket order, the entire order is invalid. The Courts cannot determine which rates are subject to its jurisdiction and which are not, and amend the order accordingly. If the Commission exceeds by one iota the power granted it, its act is void and of no effect.

The Commission in effect says: " Whether or not our power under the Constitution extends to

all these rates we will raise them all, and if we have exceeded our power the States can come in and point it out to us."

This is nothing less than suspending the Constitution, as to such rates as are not within its power, with leave to the sovereign State of New York to apply to have the Constitution reinstated. If things have come to such a pass, the States of this Union have indeed raised up a Frankenstein monster to destroy them. The dispensing power was advocated by the Stuart kings but is not part of our law.

And the reason for this practically admitted abuse of power is thus stated:

"This proceeding presents a practical question which we have endeavored to deal with in a practical way. The needs of these interstate carriers for revenue to enable them to provide adequate transportation service and facilities are immediate and, in the interest of the public, can not be permitted to await the consideration in detail of individual fares, charges and rates."

The law provides and the Constitution requires that the railroads should have the revenue to which they are entitled. But there is no sanction in law or in reason for the proposition that because of the claim of the railroads for additional compensation, the ancient privileges of the great State of New York should be abolished, our constitutional privileges denied, and the Constitution itself suspended at the whim of the Interstate Commerce Commission.

POINT IX.

Congress did not attempt to enlarge the scope of the power of the Interstate Commerce Commission over intrastate rates as in shown by the legislative history of the amendments of 1920.

The effect of the order of the Interstate Commerce Commission is to immutably fix every passenger rate within the State of New York. The Commission claims this power by inference and interpretation. The power is not expressly granted by the amendments to the statute. If the power is found it must be by judicial construction, rather than in the phrases of common speech although railroad companies are involved. So cryptic is the utterance of Congress that when Senator Cummings and Mr. Esch were soliciting votes to pass their bill in Congress they were able to successfully deny that the bill granted the power exercised and the vigilance of members of Congress was unable to discern the purpose found by the bureaucracy that now magnifies its office and aggrandizes its functions.

In 1896 when functionaries with a like lust for power claimed the authority to fix interstate rates under hermeneutics as extravagant as applied here, the Supreme Court rebuked them and remitted them to Congress for a clear and unequivocal expression of power. Mr. Justice Brewer said in *Interstate Commerce Commission* v. *Railway Co.*, 167 U. S. 479 at 494:

> "The question debated is whether it vested in the commission the power and duty to fix rates; *and the fact that this is a debatable question, and has been most strenuously and earnestly debated, is very persuasive*

> *that it did not. The grant of such a power is never to be implied.* The power itself is vast and comprehensive, so largely affecting the rights of carrier and shipper, as well as indirectly all commercial transactions, the language by which the power is given had been so often used and was so familiar to the legislative mind and is capable of such definite and exact statement, that no just rule of construction would tolerate a grant of such power by mere implication."

The act should, therefore, not be distorted to sustain the grant of so far reaching a result as the destruction of the State rate making power. Congress did not intend what it did not express. Indeed, Congress carefully maintained the State rate structures.

The conclusive proof of this lies in the fact that the Act reenacted (Title IV, Section 400, par. 2) the clause stressed by Justice Hughes in the Minnesota Rate Cases which states distinctly that

> "The provisions of this Act—shall *not* apply: (a) *To the transportation of passengers* or property or to the receiving, delivering, storage or handling of property *wholly within one State*, and not shipped to or from a foreign country from or to any place in the United States as aforesaid."

It is signifiant of the conclusivenes of this clause that the railroads in their briefs before the Interstate Commerce Commission and the Commission in its majority report omit all mention of this provision which is so fatal to their contentions.

Instead they rely upon two other portions of the Act which they say authorizes the conclusion that Congress has granted to the Interstate Commission the power to increase all rates in New York State as discriminatory. These two sections will be considered separately.

Section 15-a of the Transportation Act does not give jurisdiction of intrastate rates to the Interstate Commerce Commission.

This section reads in part as follows:

> "(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates *so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate)* will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: Provided, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable and to *prescribe different rates for different sections of the country.*
>
> "(3) The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission. In making such

determination it shall give due consideration among other things to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation: Provided, That during the two years beginning March 1, 1920, the Commission shall take as such fair return a sum equal to 5½ per centum of such aggregate value, but may, in its discretion, add thereto a sum not exceeding one-half of one per centum of such aggregate value to make provision in whole or in part for improvements, betterments or equipment, which, according to the accounting system prescribed by the Commission, are chargeable to capital account.

"(4) For the purposes of this section, such aggregate value of the property of the carriers shall be determined by the Commission from time to time and as often as may be necessary. The Commission may utilize the results of its investigation under section 19a of this act, in so far as deemed by it available, and shall give due consideration to all the elements of value recognized by the law of the land for rate-making purposes, and shall give to the property investment account of the carriers only that consideration which under such law it is entitled to in establishing values for rate-making purposes. Whenever pursuant to section 19a of this Act the value for the railway property of any carrier held for and used in the service of transportation has been finally ascertained, the value so ascertained shall be deemed by the Commission to be the value thereof for the purpose of determining such aggregate value.

"(5) Inasmuch as it is impossible (without regulation and control in the interest of the commerce of the United States considered as a whole) to *establish uniform rates upon competitive traffic* which will adequately sustain all the carriers which are engaged in such traffic and which are indispensable to the communities to which they render the service of transportation, without enabling some of such carriers to receive a net railway operating income substantially and unreasonably in excess of a fair return upon the value of their railway property held for and used in the service of transportation, it is hereby declared that any carrier which receives such an income so in excess of a fair return, shall hold such part of the excess, as hereinafter prescribed, as trustee for, and shall pay it to, the United States."

Of course, the object of this section is fully revealed in this last paragraph (5). That this was its only purpose appears plainly from the words of Congressman Esch on the final presentation of the bill to the House on February 28, 1920.

"I shall take up what is known as Section 6. You will find it in section 422 of the pending bill. It provides for a rate of return on the valuation of railroad property either taken as a whole or within a given district or territory. This provision was not in the House bill. Against it the House conferees stood for 5 or 6 weeks and until the compromise was finally reached. The whole basis for section 6 can be found in these words in the bill, on page 91, paragraph 5."

He then quotes paragraph (5) above set out and continues:

"The large problem that has given difficulty to the Interstate Commerce Commission and to every regulatory body heretofore has been the fixing of rates on competitive traffic which will not allow one road to earn excessive income while another road on the same rate does not get a sufficient income. No formula has under existing law yet been discovered to meet that situation. You can meet it in two ways — by consolidation of all carriers under one system, where there would not be the problem of the weak and the strong, or under the plan suggested in section 422."

(*Congressional Record*, Vol. 59, p. 3912.)

Thus the only object was to solve the perplexing problem of uniform rates on competitive traffic carried partly by strong and partly by weak roads. There is no intimation that the section in question is intended to overrule the provision above quoted prohibiting interference by the Commission with the transportation of passengers "wholly within one State."

The Commission, however, entirely ignores this provision, bases its interference with purely intrastate rates on an extraordinary interpretation of this section 15-a.

It then states (p. 189):

"Congress has directed that we allow rates that will yield in the aggregate a return of 5½ or 6 per cent. upon the value of the railway property in each of the groups. There can be no doubt of the power of Congress to devise and provide for carrying into effect a plan for assuring to the nation's

interstate railroads a fair return upon the value of their property; and the full control by Congress of this matter is not to be denied on the ground that the carriers' aggregate earnings are a commingling of intrastate revenue and interstate revenue * * *."

The same phase of the question is somewhat similarly expressed in one of the more recent of these State rate cases.

Intrastate Rates within Illinois, 59 I. C. C. 350, 364.

"In our decision in Increased Rates, 1920, we fixed the increases in rates, fares and charges necessary to comply with the act. It must be remembered that in fixing those increases we were acting within our power 'to prescribe just and reasonable rates.' The resulting rates therefore become, in effect, what Congress has deemed on the whole necessary to yield the carriers the prescribed return on the value of their property.

"It is further urged that in Increased Rates, 1920, we did not find the value of any railroad property in the State of Illinois or elsewhere in the eastern or western groups as designated in that report. We were directed to prescribe rates so that in the aggregate they would yield a certain return, as nearly as may be, 'upon the aggregate value of the railway property of such carriers held for and used in the service of transportation.' *We understand the interstate commerce act to require us to determine upon a valuation for the total property of the carriers and not for the property that might by some necessarily arbitrary method or formula be assigned to interstate traffic,*

and that is the course we followed in arriving at the estimated value used in Increased Rates, 1920.

" In that case, conformably to the act, in the exercise of our power to prescribe just and reasonable rates, we determined the increased fares that were necessary in order that the passenger traffic should contribute its proper proportion to a fair return on the aggregate property value. *If, without good reason, the fares within a state are lower than those authorized and established for interstate application, intrastate passenger traffic will not contribute its just share to the passenger revenues of the carriers, and the carriers may not earn the statutory return without further increases in the transportation charges on other traffic, including interstate commerce, thus unjustly discriminating against such commerce.*"

In other words, the Commission has attempted completely to override the explicit provision against interference with " the transportation of passengers or property wholly within one State " by a broad construction of the Congressional mandate to fix rates for " carriers as a whole." Obviously inconsistencies should be reconciled. It is not proper to disregard one section because another is inconsistent with it.

And what is there extraordinary or unusual about a mandate to consider the entire valuation of all the railroads of the country? Why should such a natural provision suddenly be seized upon to overthrow the Constitutional rights of the States?

For years, under section 19-a of the Interstate Commerce Act the Commission has been at work

ascertaining a valuation of the railroads as a whole. Yet that section was never brought out as an excuse for interfering with intrastate rates.

Indeed, how can the allocation between property devoted to interstate and intrastate commerce be properly made unless the entire property be preliminarily valued? In the Minnesota Rate Cases (*supra* at p. 433) with its exhaustive analysis of the property devoted to interstate traffic Justice Hughes necessarily took as a starting point the entire value of the railroads involved. This must be so in any case involving interstate rates on a railroad carrying both kinds of traffic. It may not be validly argued from such a provision that he power of the Commission over intrastate rates has been extended by a provision to value the railroad properties as a whole.

Of course, it is a difficult thing, where some roads are concerned, to make the calculations necessary for the allocations of expenses and property between intrastate and interstate traffic. But mere difficulty in the problem assigned them does not excuse public officers from doing their duty. Nor does it lead to the assumption that Congress meant to do what it had no power to do under the Constitution and what there is no scintilla of evidence in the Act in question that it intended to do.

The reasonable construction of the Act as a whole evidently is that the Interstate Commerce Commission shall consider, in carrying out its mandate, the entire property of the railroads, but *its power to fix rates is limited, as always, to interstate rates.*

It is to be assumed that the States must allow rates which will yield a fair rate of return to the carriers upon the property engaged in intrastate commerce. The States may allow eight (8) per cent, they may allow ten (10) per cent. They certainly could not allow less than 5½ or 6 per cent without running the imminent risk of having their rates declared confiscatory under the 14th amendment.

If the Interstate Commerce Commission is bound by law to allow a return of 6 per cent upon the property engaged in interstate commerce and if the States are bound by law to allow a similar return upon the carriers' property engaged in intrastate commerce, how can the "carriers as a whole" fail to receive the return contemplated? Plainly they cannot. The exact intention of Congress would be carried out and the Constitutional rights of the States maintained.

By the report and order of the Commission, it does not appear in any way that the rates prevailing in New York yield less than a 6 per cent return. Indeed, the fact, recited in the report (p. 291) that the railroads applied for increases to the Public Service Commission and that the application was denied, conclusively negatives any assumption that present rates will yield less than 6 per cent, so far as this proceeding is concerned. It not having been found, either by the Commission, the Legislature or the Courts, that present rates yield less than an adequate return, it must be assumed that they do yield such return. That being the case, the additional revenue of $11,000,000 to $12,000,000 which this order is designed to procure for the railroads will really be a tax

upon intrastate commerce for the benefit of interstate. It is a declaration that the defendants here must from its intrastate commerce earn more than a fair return in order to make up for some deficiency of another road in interstate commerce.

Indeed, the weakness of relying solely upon this, which may be called the "financial burden" phase of the alleged discrimination, is fully recognized by the Commission itself. It constantly leaves this phase and runs to the second phase which will now be considered.

This second phase may be designated the Shreveport phase of the alleged discrimination, relying upon Paragraphs 3 and 4 of Section 416 of the Transportation Act.

Section 416 of the Interstate Commerce Law was intended merely to give proper administrative means to enforce the Shreveport doctrine. The pertinent part of the section is:

> "(3) Whenever in any investigation under the provisions of this Act, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this Act with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and

of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the co-operation, services, records, and facilities of such State authorities in the enforcement of any provision of this Act.

"(4) *Whenever in any such investigation the Commission, after full hearing, finds that any such rate, or fare, or charge,* classification, regulation, or practice *causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in interstate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful it shall prescribe the rate, fare, or charge,* or the maximum or minimum, or maximum and minimum, *thereafter to be charged,* and the classification, regulation, or practice thereafter to be observed, *in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges,* classifications, regulations, and practices, *shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."*

The Senate bill introduced by Senator Cummins on December 8, 1919, and the House bill,

introduced by Congressman Esch, November 11, 1919, as well as the conference measure finally passed, were similar in phraseology and identical in intent.

On December 4, 1919, Senator Cummins explained his bill to the Senate at length. As to these two sections he said:

> "I call attention next to section 43 which presents also a long standing controversy and a most important one, and upon which Senators will have, I am sure, decided opinions. * * *
>
> For years there has been a conflict between the jurisdiction of the Federal Government and the jurisdiction of the State Governments with regard to the adjustment of rates. All of you know that the Constitution of the United States confers upon Congress the authority to regulate commerce among the states and with foreign nations. *Obviously this authority is limited to the regulation or control of interstate commerce and matters that are inseparably connected with or incident to interstate commerce.* The Supreme Court of the United States has had occasion in at least three separate cases to discuss the subject.
>
> Most of you, I am sure, are familiar with what is known as the Shreveport decision" (see Congressional Record, Vol. 59, p. 143).

He then described in a general way the Shreveport decision, the Minnesota Rate Cases and the Illinois situation then in litigation.

He proceeded to say:

> "The *committee has attempted simply to express the decisions of the Supreme Court of the United States. We have not attempted to carry the authority of Congress*

beyond the exact point ruled by the Supreme Court in the cases to which I have referred; and the only thing we have done in the matter has been to confer upon the Interstate Commerce Commission the authority to remove the discrimination, when established in a proper proceeding before that body—an authority which it does not now have" (see Congressional Record, Vol. 59, No. 4, p. 143).

Similarly, Congressman Esch spoke of the purpose of his bill when explaining it to the House on November 11, 1919:

> "*We also provide for the enactment into law of what is popularly known as the decisions of the Supreme Court in the Shreveport cases.* Where intrastate rates constitute an undue burden, advantage, preference, or prejudice against interstate rates, such rates are declared to be unlawful. *We have incorporated into law the decision of the court.* When by reason of the low level of the intrastate rates an undue burden is cast upon the interstate traffic the citizens and the shippers of other states are compelled to pay *higher interstate freight rates* than they would have had to pay had that State enacted or put in force and effect proper intrastate rates" (Vol. 58, Cong. Record, p. 8317).

Moreover this is borne out by the testimony of Commissioner Clark before the House Committee.

It is quite natural to suppose that when Congressman Esch and Senator Cummins were drawing their bills they should go for suggestions to Commissioner Clark, the Commissioner who had

been longest in office and who was recognized nationally as an expert on these matters in the country. It must be remembered that in the Illinois passenger case (*Illinois Central R. R.* v. *Public Utilities Commission*, 245 U. S. 493), the Supreme Court had held in 1918 that an order of the Interstate Commerce Commission similar to the Shreveport order was too indefinite for enforcement. Undoubtedly and quite properly this fact influenced Commissioner Clark in his desire to make more definite and certain the Commission's power as it had already been announced by the Supreme Court and to facilitate the exercise of that power.

When called as first witness before the Committee, he stated:

> "I doubt if it is necessary, Mr. Chairman, for me to detail much of the history of this situation as it has developed from the original decisions and reports of the commission in the so-called Shreveport case, and the decision of the Supreme Court sustaining the Commission.
>
> The law as it now stands and as it is interpreted by the commission and by the Supreme Court authorizes the commission to require the removal of undue preference or undue prejudice and to correct the differences between the levels of State and interstate rates, in doing which it must prescribe the reasonable maximum interstate rates, and thus, by a roundabout process, it results that the commission fixes the level of the maximum interstate rates and requires the removal of undue preference and undue prejudice found to exist under the States rates, *which gives the carrier authority to increase,*

if necessary, or if it so elects, the State rates to the level of the interstate rates as found reasonable" (Hearings before Committee of the House on Interstate and Foreign Commerce, Hearings on H. R. 4378, Vol. I, p. 26).

See also his further testimony

Hearings before House Committee (*supra*), pages 27, 28, 68-70, 110, 111.

He later summed up his opinion as to whether the powers of the Commission would be enlarged by this provision, when the following colloquy took place between him and Mr. Sanders of Indiana:

"Mr. Sanders of Indiana: Mr. Commissioner, I wish you would be kind enough to state for the record the power that was recognized in the commission by the Shreveport case.

Mr. Clark: The power to require the removal of undue prejudice against interstate shipment resulting from the application of intrastate traffic of a scale of rates prescribed by the State Commission and the maintenance of *higher rates on interstate traffic over the same line for corresponding distances* and under substantially similar circumstances and conditions.

Mr. Sanders of Indiana: Section 13 of this act, which proposes to amend Section 13 of the original act, deals with that question of additional power which Section 13 gives the Interstate Commerce Commission.

Mr. Clark: *I do not think that it gives us any more power under the law. I do not think it expands or contracts the application*

of the terms of the law or the commission's power thereunder, but it does define a relationship and outline a procedure that we hope will operate to minimize the number of instances in which undue prejudice will exist, and to simplify the removal of it where it may be found to exist." (Hearings before Committee [*supra*], Vol. I, p. 110.)

Here then we have the opinions of the three persons best qualified to speak as to the purpose of these sections of the statute. And they are unanimous that there was no intent to broaden the powers of the Commission beyond those it had already been found to have by the Supreme Court decisions in the Shreveport and similar cases.

In his opening statement Mr. Clark called attention to the words " except as expressly provided in section 13 thereof," in the proviso (Report of Hearings on H. R. 4378, page 11) and read the portion of the amendment to paragraph 13 containing the " undue burden " provision (Report of Hearings, page 26). On his appearance at the close of the hearing he was asked to give an illustration " of what would be a burden upon interstate commerce as that term is used." He replied: "An unreasonably and unduly low level of rates within the State which were not at the same time alleged to be or shown to be unduly preferential of or unduly prejudicial against any particular person or community." (Report of Hearings, page 2964.)

This proposed extension of power was strongly opposed by the rate regulating authorities of the several States. The National Association of Railway and Utilities Commissioners, through its

General Solicitor, Mr. Elmquist, made the following statement concerning the same at the hearing before the House Committee:

> " It is our judgment that the introduction of the words ' undue burden upon interstate or foreign commerce ' introduces a new element into the rate structure of the Federal act, and it may ultimately give to the Interstate Commerce Commission authority to deprive the states of the Union of any power whatever over intrastate commerce. * * * A few years ago the Supreme Court had before it the Illinois Passenger Rate Case. Under the statute of that state, the passenger rates were 2 cents per mile. The Interstate Commerce Commission had approved interstate rates based upon 2½ cents per mile. There was a complaint alleging discrimination between the passenger rates to St. Louis and East St. Louis and Keokuk and Hamilton, as well as Chicago. The Interstate Commerce Commission heard that case and made an order, in which it found that the rates, state and interstate, were unduly discriminatory and resulted in undue prejudice and advantage, and asked the carriers to remove that discrimination.
>
> In that case the commission writing the decision found that the 2-cent rate was a burden upon interstate commerce. So, the Interstate Commerce Commission did say that those rates were a burden upon interstate commerce. The Supreme Court ignored that particular finding, but held to a finding of the particular discrimination between communities. If the word " burden " had been a part of the statute at that time, it may not be far-fetched to assume that the commission would have said that those rates were a burden upon interstate commerce and

the court would have said that the commission's findings were within the law. * * * It is inconceivable to me, gentlemen, that this committee will attempt in an indirect way to take from the states that power which they have reserved unto themselves. I fear that that will be the result of those words in the statute." (Report of Hearings, page 1622.)

The House, however, did not strike out the objectionable words, and the Association filed with the Conference Committee a memorandum, in which the provision was further discussed, in part as follows:

"It is provided that whenever the Interstate Commerce Commission shall investigate 'any rate, fare, charge, classification, regulation, or practice made or imposed by authority of any state * * * the Commission shall have authority * * * to make findings and orders * * * to remove * * * *any undue burden upon interstate or foreign commerce* * * *. The law of any state or the decision or order of any state authority to the contrary notwithstanding.'

If this provision shall become law it will operate to *deprive the state Commissions of their power to make with final effect any rate, service or other regulatory order.*

We make this subject the first for discussion in this memorandum because we deem it of most vital importance to the state Commissions and to the people of the states whose interest they represent.

The question involved is whether Congress desires to preserve the powers of the state Commissions or to destroy them." (Memorandum of National Association of Ry. and Pub. Utilities Commissioners, page 2.)

The Conference Committee struck out from said paragraph 4 the words "undue burden" and wrote in their place "undue, unreasonable or unjust discrimination," thereby making the first part of the paragraph nothing more than a re-statement of the effect of section 3 of the Act, and leaving untouched the reserved power of the States over rates on traffic within their own borders, other than as such power was before limited by said section 3. This made the words "except as provided in section 13 thereof," proposed to be put into the proviso in section 1, unnecessary and inappropriate, and the reservation was re-enacted in the words used in the Act when originally passed, as follows:

> "Sec. 1. * * * (2) The provisions of this Act * * * shall not apply—
>
> (a) To the transportation of passengers or property * * * wholly within one State and not shipped to or from a foreign country from or to any place in the United States. * * *"

When Congress did this it had before it the opinions of the Supreme Court interpreting the Act to Regulate Commerce. It knew that in the Minnesota Rate Cases opinion the court had said that the proviso in section 1 was intended by Congress to define the "scope of its regulation." And it enacted the proviso just as it stood in the original Act.

It is a rule, too elementary to require the citation of authorities, that when a legislative body re-enacts a statute or part of a statute which has received judicial construction, it adopts the construction which has been placed upon it. Accordingly, by the re-enactment of this reservation

Congress emphasized its intent not to encroach upon the domain of intrastate traffic beyond the extent to which it had originally done so indirectly by the prohibition against discrimination in section 3, now reaffirmed in paragraph 4 of section 13.

It is impossible to read the Act as it finally passed, in the light of its legislative history, and in the light of the most cardinal rules of construction, and entertain doubt that Congress on this particular point accepted the view of those who spoke for the preservation of State authority, and determined to withhold from the Commission the power for which it asked. By design Congress limited the power of the Commission to the correction of discriminatory situations injuriously affecting persons and localities. We do not believe that the eager insistence of carriers will lead this Court to attempt to override the will of Congress by reading into the Act something which Congress deliberately left out.

An incident which occurred in the course of the consideration of the bill in Congress is most significant as indicating the definite intention of Congress to restrain the Commission from invasion of the State field of regulation. In the Esch Bill, when introduced, in place of the words " the Commission shall have authority * * * to make * * * orders * * * to remove any undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand," appeared the words " the Commission shall have the authority * * * to make * * * orders

* * * to remove any undue preference or prejudice as between persons or localities in State and interstate and foreign commerce." Mr. L. B. Boswell made inquiry by letter of Chairman Esch as to whether this language was intended to extend the power of the Interstate Commerce Commission to and over rates applying as between persons or localities wholly intrastate. The letter was referred to Chairman Clark of this Commission, and his reply was made part of the record. He said:

> "Mr. Boswell asks for interpretation of the language occurring in lines 18 to 23 on page 21 of the bill and inquires whether it is intended to confer upon the Interstate Commerce Commission jurisdiction of complaints of undue preference or prejudice as between parties or places within one State. In other words, does it confer upon the commission jurisdiction of complaints of undue preference or prejudice wholly intrastate? The answer to this is, of course, "no." The language in question refers only to undue preference or prejudice as between persons or localities in state commerce on the one hand and interstate commerce or foreign commerce on the other hand, and I do not think there is any probability that it will be misunderstood or misconstrued."

While Chairman Clark had expressed the opinion that the language originally carried in the bill could not be construed to extend the power of the Commission to deal with discriminations existing between intrastate rates, Congress desired to exercise extreme care on that

point, and adopted the concise and explicit words "between * * * intrastate commerce * * * on the one hand and interstate and foreign commerce on the other hand," which Chairman Clark had used in his letter to negative any such construction.

We take it to be established then that nothing contained in paragraph 4 in any way enlarges the power of the Commission beyond what it was before that paragraph was added to the Act, except only with respect to its power and duty to prescribe rates to be observed for the purpose of removing discriminations found.

POINT X.

The doctrine of the so-called Shreveport cases has not broadened materially the power of Congress over purely intrastate commerce.

Preliminarily, let us examine the essential facts which led to interference with State-made rates in these cases.

Minnesota Rate Cases, 230 U. S. 352, involved the 2-cent passenger rate law of Minnesota and certain freight rates instituted by that State. The burdens complained of on interstate commerce arose from the fact that the border cities of Minnesota had an advantage over the competing cities across the border in North Dakota and Wisconsin, owing to the fact that passengers and freight could be transported between points in Minnesota and the border cities of that State more cheaply than between the same points in Minnesota and the cities of other States which competed with the border cities of Minnesota

(p. 385). It was proved that there was a well-defined course of commerce between Minnesota communities and the Minnesota border cities, and between the same communities and cities in other States competing with those border cities (p. 384). It also appeared that, since the intrastate rates had been reduced and as the "necessary, immediate and direct effect" thereof (p. 390), there was a falling off in traffic to the cities beyond the borders of Minnesota, an increase in traffic to those border cities and a practice growing up of buying interstate tickets across the State line and repurchasing at State rates for the journey in Minnesota.

Houston and Texas Ry. Co. v. *U. S.*, 234 U. S. 342,

known as the Shreveport case, involved the competing cities of Shreveport, La., on the one hand and Dallas and Houston, Texas, on the other (p. 346). Freight rates only were involved. There was a through line between Shreveport and Dallas and one between Shreveport and Houston. Shreveport actively competed with Dallas and Houston for the business of the intervening territory. The discrimination complained of was that the State rates from Houston and Dallas eastward to points in Texas were much less than those from Shreveport westward to the same points. The "difference was substantial and injuriously affected the commerce of Shreveport." (p. 346).

Adams Express Co. v. *Caldwell*, 244 U. S. 617,

known as the South Dakota case, involved the express rates fixed by the State of South Dakota.

These were lower than those in 40 other States and 40 per cent lower than interstate rates. The order of the Commission directing the elimination of the discrimination was made on complaint of the Traffic Bureau of the Sioux City (Iowa) Commercial Club, which set up that since the increase in interstate rates it could no longer compete with cities in South Dakota for the business in that State (pp. 619, 620).

Illinois Central Railroad v. *Public Utilities Commission*, 245 U. S. 493,

known as the Illinois case, involved the validity of the Illinois 2-cent passenger statute. Interstate rates had advanced to 2.5 cents (p. 495) and were found reasonable by the Commission at 2.4 cents (p. 496). The complaining city was St. Louis, Missouri, which proved (*Business Men's League of St. Louis* v. *Atchison, Topeka & Santa Fe Railway Co.*, 41 I. C. C. 13, 19, 20), that since the increase in interstate rates from St. Louis to Chicago and intervening points, that there had been a marked falling off in interstate business from St. Louis to such points and a marked increase in intrastate business from East St. Louis to those points in Illinois. Keokuk, Iowa, intervened, claiming a similar falling off in traffic between it and points in Illinois. It appeared that since the higher interstate rate went into effect, large numbers of people were crossing the State line from St. Louis to East St. Louis, Ill., and there repurchasing for points in Illinois (*Business Men's League of St. Louis* v. *A. T. & S. F., etc., supra*, p. 19). The Commission found discrimination in favor of East St. Louis and against

St. Louis, as well as in favor of Hamilton and other Illinois cities as against Keokuk, Iowa. It ordered that the discriminations be eliminated so far as they existed on "reasonably direct lines" (*Business Men's League, etc.*, v. *A. T. & S. F., etc., supra*, p. 28), between St. Louis and Chicago and between Keokuk and Chicago. This order was held invalid as too indefinite.

That all of these cases forcibly reaffirmed the doctrine of the right of the States to regulate their own internal commerce is evident from a study of these decisions. In the Minnesota Rate Cases (*supra*) it was said (p. 417):

> "When Congress, in the year 1887, enacted the Act to Regulate Commerce (24 Stat., 379, c. 104), it was acquainted with the course of the development of railroad transportation and with the exercise by the States of the rate making power. * * * Congress carefully defined the scope of its regulation, and expressly provided that it was not to extend to purely intrastate traffic. In the first section of the Act to Regulate Commerce there was inserted the following proviso:
>
> 'Provided, however, That the provisions of this Act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State, and not shipped to or from a foreign country from or to any State or Territory as aforesaid.'
>
> When in the year 1906 (Act of June 28, 1906, c. 3591, 34 Stat., 584), Congress amended the act so as to confer upon the federal commission power to prescribe

maximum interstate rates, the proviso in section one was re-enacted. Again, in 1910, when the act was extended to embrace telegraph, telephone and cable companies engaged in interstate business, the proviso was once more re-enacted, with an additional clause so as to exclude intrastate messages from the operation of the statute.

There was thus excluded from the provisions of the act that transportation which was 'wholly within one State,' with specified qualification where its subject was going to or coming from a foreign country."

And again (p. 420):

"The question we have now before us, essentially, is whether after the passage of the Interstate Commerce Act, and its amendment, the State continued to possess the state-wide authority which it formerly enjoyed to prescribe reasonable rates for its exclusively internal traffic. * * * Having regard to the terms of the Federal statute, the familiar range of state action at the time it was enacted, the continued exercise of state authority in the same manner and the same extent after its enactment, and the decisions of this court recognizing and upholding this authority, we find no foundation for the proposition that the Act to Regulate Commerce contemplated interference therewith."

In the Shreveport case (*Houston E. & W. T. Ry. Co.* v. *U. S., supra*) it was said (p. 357):

"Congress thus defined the scope of its regulation and provided that it was not to extend to purely intrastate traffic. It did not undertake to authorize the Commission to

prescribe intrastate rates and thus to establish a unified control by the exercise of rate-making power over both descriptions of traffic. Undoubtedly — in the absence of a finding by the Commission of unjust discrimination, intrastate rates were left to be fixed by the carrier and subject to the authority of the States or of the agencies created by the States."

POINT XI.

The States, under the Constitution, have the right to regulate commerce within their respective borders. Congress has not that right and cannot acquire it except by constitutional amendment.

The right to regulate commerce is an attribute of sovereignty. It has its roots, in our jurisprudence, far back in the common law.

Lord Chief Justice Hale (1609–1676) in his "de Portibus Maris" (1 Harg. 77) wrote:

> "A man, for his own private advantage, may, in a port or town set up a wharf or crane, and may take what rates he and his customers can agree for cranage, wharfage, housellage, pesage; for he doth no more than is lawful for any man to do, viz., makes the most of his own * * *
>
> If the king or subject have a public wharf, unto which all persons that come to that port must come and unlade or lade their goods as for that purpose, because they are the wharfs only licensed by the queen, * * * or because there is no other wharf in that port, as it may fall out where a port is newly erected; in that case there cannot be taken arbitrary and excessive duties for cranage,

> wharfage, pesage, etc., neither can they be enhanced to an immoderate rate; but the duties must be reasonable and moderate, though settled by the king's license and charter. For now the wharf and crane and other conveniences are affected with a public interest, and they cease to be juris private only; as if a man set out a street in new building on his own land, it is now no longer bare private interest but is affected by a public interest."

and again (p. 6):

> "No man may set up a common ferry for all passengers, without a prescription, time out of mind, or a charter from the king. He may make a ferry for his own use or the use of his family, but not for the common use of all the king's subjects passing that way; because it doth in consequent tend to a common charge, and is become a thing of public interest and use, and every man for his passage pays a toll, which is a common charge, and every ferry, ought to be made public regulation, viz., that it give attendance at due times, keep a boat in due order and take but reasonable toll; for if he fail in these, he is fineable."

It was probably not long after this posthumous treatise saw the light that there was passed (1691) an act which is of peculiar interest both because of the significant reasons given for its passage and because it contains, in its few sentences, practically all of the essential elements of our cumbersome statutes delegating to public utility commissions the rate fixing power.

This Act (3rd William and Mary Chap. 12, Section XXIV) reads as follows:

> "And whereas divers waggoners and other carriers, by combination amongst themselves, have raised the prices of carriage of goods in many places to excessive rates, to the great injury of trade, be it therefore enacted — That the justices of the peace of every county and other place . . . shall have power and authority and are hereby enjoined and required at their next respective quarter or general sessions after Easter day yearly, to assess and rate the prices of all land carriage of goods whatsoever, to be brought into any place or places within their respective limits and jurisdictions, by any common waggoner and carrier, and the rates and assessments so made, to certify to the several majors and other chief officers of each respective market town within the limits and jurisdictions of such justices of the peace, to be hung up in some public place in every such market town, to which all persons may resort for their information; and no such common waggoner or carrier shall take for carriage of such goods and merchandises above the rate and prices so set upon pain to forfeit for every such offense the sum of five pounds * * * to the use of the party aggrieved."

Thus this doctrine of the right of the sovereign to regulate commerce was deeply imbedded in the common law when in 1776 the thirteen colonies became thirteen "free and independent states." This right to regulate commerce, passed to the several independent colonies as an incident of their new found sovereignty.

As it is expressed in *Munn* v. *Illinois*, 94 U. S. 113, 124.

> "When the people of the United Colonies separated from Great Britain, they changed the form, but not the substance of their government. They retained for the purposes of government all the powers of the British Parliament and through their State constitutions, or other forms of social compact, undertook to give practical effect to such as they deemed necessary for the common good and the security of life and property."

It takes only a glance at the history of the Colonies before and during the Confederation to realize how thoroughly convinced each colony was of its right to regulate commerce and to what extent the colonies went in such regulation to their mutual distress. (See McMaster: History of the People of the United States, Vol. I, Chap. III, pp. 266, 272 et seq. Schouler: History of the United States, Vol. I, p. 23.)

To obviate the difficulties and dissensions that bid fair to make the colonies an easy prey to foreign aggression (Federalist No. 42), and to provide against the laying of import and export duties against each other (Federalist No. 7), they voluntarily gave up a small part of this inherent power when they adhered to the federal Constitution.

The deed of gift was in these words: "The Congress shall have power * * * to regulate commerce with foreign nations; and among the several States, and with Indian tribes."

As the necessity for this gift of power to the central government was probably the most cogent

factor in bringing about the ratification of the Constitution, so it must necessarily be that the words that express the gift contain the sense of all that it was thought necessary to give and the reservations of power to the States or to the people are peculiarly applicable to every portion of this sovereign power not expressly delegated to the Congress.

That this is so is quite evident from the trend of the decisions of our highest court.

Chief Justice Marshall laid down the general rule in the leading case of *Gibbons* v. *Ogden*, 9 Wheat. 1, 195, where he said:

> "The genius and character of the whole government, seems to be, that its action is to be applied to all the external concerns of the nation and to those internal concerns which affect the States generally; but not those which are completely within the particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. *The completely internal commerce of a State, then, may be considered as reserved for the State itself.*"

This same doctrine has been enunciated and approved time and again. Thus, in

The Passenger Cases, How. 283, 394,

in considering the question as to the power of a State to tax steerage passengers entering from a foreign country:

> "It is admitted that in regard to the commercial, as to other powers, the States cannot be held to have parted with any of the

attributes of sovereignty which are not plainly vested in the Federal Government and inhibited to the States, either expressly or by necessary implication."

Similarly, in one of the *Granger* cases, the Court stated in terms that might be applied to the Long Island Railroad and many other roads herein:

> *"This road * * * is situated within the limits of a single State. Its business is carried on there and its regulation is a matter of domestic concern"* (*Chicago, Burlington & Quincy Railroad* v. *Iowa*, 94 U. S., 155, 163).

And about the same time, in speaking of the State's right to regulate warehouse charges, it said:

> *"Incidentally* they may become connected with inter-state commerce, but not necessarily so. Their regulation is a thing of domestic concern, and certainly, until Congress acts in reference to their inter-state relations, the State may exercise all the powers of Government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction" (*Munn* v. *Illinois*, 94 U. S., 113, 135).

Again, the Court said flatly in *County of Mobile* v. *Kimball*, 102 U. S. 691, 699:

> *"The States have as full control over their purely internal commerce as Congress has over commerce among the several States and with foreign nations."*

Not long after the States began the institution of regulatory bodies the railroads, impatient of

any control, fought with the same vigor that greeted the passage of the Commerce Act in 1887, the constitutionality of the new State statutes. Justice Waite said, in considering this question in

> *Railroad Commission Cases, Stone* v. *Farmers' Loan and Trust Co.*, 116 U. S. 307, 325.

> "It is now settled in this court, that a state has power to limit the amount of charges by railroad companies for the transportation of persons and property within its own jurisdictions unless restrained by some contract in the charter, or unless what is done amounts to a regulation of foreign or interstate commerce."

> Citing

> *Railroad Co.* v. *Maryland*, 21 Wall. 456;

> *Chicago, Burlington & Quincy Railroad Co.* v. *Iowa*, 94 U. S. 155;

> *Peik* v. *Chicago and Northwestern Railway Co.*, 94 U. S. 164;

> *Winona & St. Peter Railroad Co.* v. *Blake*, 94 U. S. 180;

> *Ruggles* v. *Illinois*, 108 U. S. 526, 531,

and again (p. 334):

> "Every person, every corporation, everything within the territorial limits of a State is while there, subject to the constitutional authority of the State Government. Clearly under this rule, Mississippi may govern this corporation, as it does all domestic corporations in respect to every act and everything within the State which is the lawful subject of State government. It may, beyond all

question, *by the settled rule of decision in this court, regulate freights and fares for business done exclusively within the State, and it would seem to be a matter of domestic concern to prevent the company from discriminating against persons and places in Mississippi.*"

See, also:

Wabash, St. Louis and Pacific Railway Co. v. *Illinois*, 118 U. S. 557, 564, 565.

Sands v. *Manistee River I. Co.*, 123 U. S. 288.

Dow v. *Biedleman*, 125 U. S. 680.

Chicago, M. & St. P. R. Co. v. *Minnesota*, 134 U. S. 418.

Chicago & Grand Trunk Co. v. *Wellman*, 143 U. S. 339.

Covington & Cincinnati B. Co. v. *Kentucky*, 154 U. S. 204.

St. Louis & San Francisco Ry. Co. v. *Gill*, 156 U. S. 649.

Texas & P. R. Co. v. *I. C. C.*, 162 U. S. 197.

Smyth v. *Ames*, 169 U. S. 466.

Reid v. *Colorado*, 187 U. S. 137, 147.

Cummings v. *Chicago*, 188 U. S. 410, 427.

Gulf, Colorado and Santa Fe Ry. Co. v. *Texas*, 204 U. S. 403, 413.

Southern Ry. v. *U. S.*, 222 U. S. 20, 26.

Chicago, Milwaukee and St. Paul Railway Co. v. *Iowa*, 233 U. S. 334, 343.

Pennsylvania Railroad Co. v. *Mitchell Coal & Coke Co.*, 238 U. S. 251, 253.

Arkadelphia Co. v. *St. L. S. N. Ry. Co.*, 249 U. S. 134, 151, 152
Public Utilities Commission v. *Landon*, 249 U. S. 236, 245.
Southern Pacific Co. v. *Arizona*, 249 U. S. 472, 477.

But perhaps the most striking example of this insistence of the Supreme Court upon the maintenance of the State's right of regulation is found in two of the most recent decisions of the Court involving this question:

South Covington & Cincinnati St. Ry. Co. v. *Kentucky*, 252 U. S. 399;
Cincinnati, Covington & Erlanger Ry. Co. v. *Kentucky*, 252 U. S. 408.

These cases involved the validity of a State law of Kentucky providing for separate cars on all railroads for the colored race or a separate compartment for them. The South Covington and Cincinnati Street Railway Company owned and controlled the Cincinnati, Covington and Erlanger Railroad. The latter had a franchise from the State of Kentucky and owned about ten miles of track in that State. It owned no cars, however, and its line was operated by the former road. The business was that of running single truck trolley cars between Covington, Kentucky, and Cincinnati, Ohio, at a 5-cent fare. Eighty per cent of the business was interstate, and Justice Day pointed out in his dissenting opinion that the application of the law would be peculiarly embarrassing. It could not be applied to interstate traffic, concededly, so that colored persons in that traffic, 80 per cent of those who rode, could ride

in the "white" compartment, while only the small number in intrastate traffic must ride in the "colored" compartment.

None the less, the Court held that the law was applicable, saying (p. 403):

> "In answer and in resistance to the conclusion of the court, the railway company contends that it operates a railway between designated termini, one being in Kentucky and the other in Ohio, that the price of a fare may be a single one of 5 cents for the complete trip in the same car taken at or terminating at the respective termini, and that therefore the car and passenger are necessarily interstate. Thus viewed they undoubtedly are, but there are other considerations. There was a distinct operation in Kentucky. An operation authorized and required by the charters of the companies, and it is that operation the act in question regulates, and does no more, and therefore is not a regulation of interstate commerce. This is the effect of the ruling in *So. Covington & C. St. Ry. Co.* v. *Covington*, 235 U. S. 537. *The regulation of the act affects interstate business incidentally and does not subject it to unreasonable demands.*"
>
> "*The cited case points out the equal necessity under our system of government, to preserve the power of the States within their sovereignties* as to prevent the power from intrusive exercise within the national sovereignty, and an interurban railroad company deriving its power from the State, and subject to obligations under the laws of the State, should not be permitted to exercise the powers given by the State, and escape its obligations to the State, under the circumstances presented by this record, by running its coaches beyond the State lines."

A more thorough and decisive pronouncement in support of State sovereignty was never made by the highest Court. Certainly there can be no doubt, in view of this decision, that the right of the States to regulate their own commerce still stands as firm as in the day of *Gibbons* v. *Ogden* (*supra*).

The decree appealed from should be reversed and the injunction granted.

Respectfully submitted,

Albany N. Y., October 1, 1921.

CHARLES D. NEWTON,
Attorney General of New York.

EDWARD G. GRIFFIN,
Deputy Attorney General.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1921.

No. 283

THE STATE OF NEW YORK AND CHARLES D. NEWTON, Personally and as Attorney-General of the State of New York, Appellants.

against

THE UNITED STATES AND EDGAR E. CLARK, CHARLES C. McCHORD, BALTHASAR H. MEYER, HENRY C. HALL, WINTHROP M. DANIELS, CLYDE B. ACHESON, ROBERT E. WOLLEY, JOSEPH B. EASTMAN, HENRY J. FORD and MARK W. POTTER, constituting THE INTERSTATE COMMERCE COMMISSION and (intervening) LEHIGH VALLEY RAILROAD COMPANY; THE LEHIGH & HUDSON RIVER RAILROAD COMPANY; NEW YORK, ONTARIO and WESTERN RAILWAY COMPANY; ERIE RAILROAD COMPANY; NEW JERSEY and NEW YORK RAILROAD COMPANY; DELAWARE, LACKAWANNA and WESTERN RAILROAD COMPANY; THE DELAWARE & HUDSON COMPANY; GREENWICH & JOHNSONVILLE RAILWAY COMPANY and SCHOHARIE VALLEY RAILWAY COMPANY. Appellees.

SUPPLEMENTARY BRIEF FOR APPELLANTS

INTRODUCTION

Under our agreement with counsel for the Appellees their briefs were not all served upon us until the Saturday before the argument of this appeal which took place upon October 19th and 20th.

Further the Solicitor General and Mr. Thom interpolated remarks somewhat outside the range of the briefs filed by the Interstate Commerce Commission and the intervening railroads.

For these reasons and for the purpose of dealing more precisely with certain questions raised by members of the court, we respectfully beg leave to file a supplemental brief.

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The parties were not the same in Ex Parte 74 as in the proceeding reviewed here.

When there were attempts made to refer to Ex Parte 74 in the Court below, we made timely objection. (This record pages 302–303). The opinion of the Commission had laid no stress upon it; the opinion of the court below had found no importance in it; not until we came here did one of the Counsel for the Appellees insist upon the importance of Ex Parte 74 in the case at bar.

When the colloquy showing what took place before the Interstate Commerce Commission was introduced in evidence in the court below we objected and saved our objections by our specification of errors. When it was introduced before the Interstate Commerce Commission we had thought it unquestioned that our objection was saved with those of the numerous other Counsel. Chairman Clark said:

> " The objection to the admission of the record in Ex Parte 74 is overruled and will be considered as in the case " (Page 421, Fol. 2074 of this Record).

It is true that Mr. Hale said, appearing for the New York Public Service Commission:

> "On behalf of New York I might briefly state the situation. The record was, as I understand, introduced before the Public Service Commission, but, in the hearing before Mr. La Roe, it was not introduced. Simply the order was introduced. I consent, however, that it may be considered as having been introduced." (This Record p. 419 Fol. 2062).

He simply assented, of course, to the proposition that the record could be considered as having been offered and received before the Examiner, at the time when it should have been, if at all. Reading all the colloquy and looking particularly at the numerous appearances noted at the time it took place, we submit that there was never a waiver of our rights to question the admissibility of Ex Parte 74. (See appearances this record pages 182–183) At the time Ex Parte 74 was offered it was not physically produced; there was nothing to show what parts, if any, were to be deemed pertinent. As a matter of fact, and as Mr. Benton has shown upon his brief, no part of it was pertinent in the case at bar.

The opinions and order in Ex Parte 74 are before the Court at pages 308–389. As its title indicates it was an ex parte proceeding. No appearance for the appellants in the case at bar is indicated. We deny that there is any statute permitting the State of New York to be represented by Mr. Benton whose appearance is noted at page 308, fol. 1523.

If, under §13, Subd. 3 of the Interstate Commerce Act, the Interstate Commerce Commission could confer with the New York Commission, then neither under this statute nor under the laws of New York could our Commission delegate to a purely private and voluntary association, the National Association of Railway and Utilities Commissioners, the power to bind the State of New York or its Attorney-General.

Under § 13, subdivision 3, of the Interstate Commerce act, the Interstate Commerce Commission "shall cause the State or States to be notified of the proceeding" under review here. As we allege in our complaint at page 9, folio 32, New York was notified through its Governor. Even the Interstate Commerce Commission did not regard our Public Service Commission as representative of the State in the matter. The Attorney-General of New York then appeared and objected to the jurisdiction of the Interstate Commerce Commission and has been attorney of record for the State in all that has happened subsequently (page 9). This is his duty under § 62, subdivision 1, of our Executive Law, providing as follows:

> § 62. General Duties. The attorney-general shall: 1. Prosecute and defend all actions and proceedings in which the state is interested, and have charge and control of all the legal business of the departments and bureaus of the state or of any office thereof which requires the services of attorney or counsel, in order to protect the interests of the state, but this section shall not apply to any of the military department bureaus or military offices of the state."

* * * * * * * * * * *

We therefore claim:

1. That in Ex Parte 74 the Appellants here were not parties there with all that follows therefrom, including the deprivation of the right of cross-examination, production of evidence and confrontation of witness.

2. That the Commission could, with as much authority, have produced any other proceeding of any nature which it may have collected in its files in thirty-four years of experience and have sought to encumber the record with it to our discomfiture.

3. Our objection was properly taken by us or on our behalf at every opportunity. A basic but narrow reason in support of our objection is that there was no proper foundation laid for the admission of Ex Parte 74.

The New York regulatory authorities had full authority to increase the fares at the time this proceeding arose and prior to 1921. Page 19 of main brief

Our printing of the amendment to the State statute of 1921 at pages 19 and 21 of our brief threw the intervening defendants into error. (The italics used in the printing of the pertinent part of the statute are our own.) We simply wanted to show that even the doubt as regards the charter contract had now been resolved in favor of the power of the Commission. Nevertheless, the intervening defendants use this

at pages 46–48 of their own brief for the damaging charge that prior to 1921 the local authorities were without power over any rate. This is a mistake.

The Public Service Commission was entertaining the application of the Long Island Railroad for an increase of 10 per cent in fares and had granted a five cent fare to the Ulster & Delaware R. R. at the time the carriers first petitioned the Interstate Commerce Commission. The law of New York is fully stated with citation of cases at pages 30–35 of this record in the opinion of the Public Service Commission. We will quote § 49 of the Public Service Commissions Law of New York as it existed in August, 1921, and substantially as it had existed since its enactment in 1909. Under it the powers of our Commission were plain. So far as pertinent, it there provided:

> "§ 49. Rates and service to be fixed by the commission. 1. When either commission shall be of opinion, after a hearing had upon its own motion or upon a complaint, that the rates, fares or charges demanded, exacted, charged or collected by any common carrier, railroad corporation or street railroad corporation subject to its jurisdiction for the transportation of persons or property within the state, or that the regulations or practices of such common carrier, railroad corporation or street railroad corporation affecting such rates are unjust, unreasonable, unjustly discriminatory or unduly preferential, or in anywise in violation of any provision of law, or that the maximum rates, fares or charges, chargeable by any such common carrier, railroad or street

railroad corporation are insufficient to yield reasonable compensation for the service rendered, and are unjust and unreasonable, the commission shall with due regard among other things to a reasonable average return upon the value of the property actually used in the public service and to the necessity of making reservation out of income for surplus and contingencies, determine the just and reasonable rates, fares and charges to be thereafter observed and in force as the maximum to be charged for the service to be performed notwithstanding that a higher rate, fare or charge has been heretofore authorized by statute, and shall fix the same by order to be served upon all common carriers, railroad corporations or street railroad corporations by whom such rates, fares and charges are thereafter to be observed.

* * * * * * * "

Besides the cases from the State court of last resort cited by the Public Service Commission in its opinion at pages 30–35, see also *Town of North Hempstead* v. *P. S. Corp.*, 231 N. Y. 447 (Official Advance Sheets of Sept. 17, 1921, No. 1081).

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Many of the roads joined in the order complained of were never operated by the Federal Government and never accepted the Federal guarantee of earnings.

The fact that some of the roads had been under Federal control and some of them later accepted doles in the way of guarantees of earnings is sought by our adversaries to excuse this usurpa-

tion of power by the Interstate Commerce Commission.

There was no attempt by the appellees to prove what these roads were. The twelfth annual report of the New York Public Service Commission, second district, vol. 2, pages 6–8, shows that twenty-four of the roads joined in the order were never operated by the Director General or any other Federal agency at all. There is even dispute as to some of the rest.

An examination of "List of Carriers and Status of Claims under section 209 of the Transportation Act of 1920 as of — 1921" furnished us by the Interstate Commerce Commission, shows only twenty-eight roads joined in the order complained of here accepted a Federal guarantee of earnings.

This leads us to verge again upon our charge as to the mechanics of the making of this order by the Interstate Commerce Commission and the listing of the New York roads.

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Our contention as to the purely arbitrary nature of this order has been recognized since this argument by the Interstate Commerce Commission as to a certain class of roads.

We had complained as to the joinder of roads in the order which had never petitioned for relief and which have never at any time appeared before the Interstate Commerce Commission. The Interstate Commerce Commission held out a promise that we might petition them to restore

what they had taken away. We prefer, however, to submit our rights here.

Nevertheless, the Commission reopened of its own motion the case as to the Fonda, Johnstown & Gloversville R. R. We appeared at the hearing but offered no proof. The railroad was called upon for evidence but could show no more reason for this horizontal increase in fares than can all of the roads outside the trunk lines included in this order. Even when an opportunity was given it to produce " some " or " what purports to be evidence," it could make no showing justifying Federal rate fixing.

The Commission then released the road from its order, pretending that its order was intended originally only for carriers " as they respectively participate in transportation." At the time of the reopening of the proceeding, we had asked the Commission to release all roads which had not petitioned and which had not appeared at all in the proceeding. The Commission arbitrarily refused us this release, but with no more reason released the Fonda, Johnstown & Gloversville R. R.

The following is the opinion and order:

INTERSTATE COMMERCE COMMISSION.

No. 11623.

IN THE MATTER OF RATES, FARES, AND CHARGES OF THE NEW YORK CENTRAL RAILROAD COMPANY AND OTHER RAILROAD COMPANIES IN THE STATE OF NEW YORK.

Submitted June 2, 1921. Decided October 4, 1921.

Upon further hearing, order entered in pursuance of our original report herein, 59 I. C. C., 290, modified by striking out the name of the Fonda, Johnstown & Gloversville Railroad Company.

Baker, Burton & Baker and *F. A. Moore* for Fonda, Johnstown & Gloversville Railroad Company; and *Visscher, Whalen, Loucks & Murphy* for New York Central Railroad Company.

Charles D. Newton and *Edward C. Griffin* for state of New York; *Ledyard P. Hale* for Public Service Commission of the state of New York, second district; *Ambrose P. Fitz-James* for city of Amsterdam, N. Y.; *C. J. Hixson* for Rectors Parent-Teacher Association; and *Charles H. Collins* for himself.

REPORT OF THE COMMISSION ON FURTHER HEARING.

LEWIS, *Commissioner:*

In our original report herein, 59 I. C. C., 290, we found that the failure of the carriers within the state of New York to increase their standard intrastate fares and charges for the transportation of passengers in New York to correspond with the increases made by them in their interstate fares and charges resulted in undue prejudice to persons traveling in interstate commerce within the state of New York and between points in that and other states; in undue preference and advantage to persons traveling intrastate in New York, and in unjust discrimination against interstate commerce. By our order we required the carriers to remove the undue prejudice, preference and advantage, and unjust discrimination by increasing their fares and charges for intrastate application in New York.

On February 19, 1921, for good cause shown, the proceeding was reopened for further hearing on the single question of whether or not our findings and order should be modified in so far as they applied to the Fonda, Johnstown & Gloversville Railroad Company, on the ground that the intrastate rates, fares, and charges of said company are not so related to interstate rates, fares, and charges as to contravene the provisions of the interstate commerce act. The company will hereinafter be referred to as the respondent.

Respondent operates an electric and steam railroad wholly within the state of New York. It was organized in December, 1902, through the

consolidation of a company of the same name owning and operating a steam railroad, 25.5 miles in length, from Fonda northeast through Johnstown and Gloversville to Northville; an electric line operating within the city of Amsterdam and which was being extended easterly to Schenectady and westerly to Tribes Hill; and an electric line from Gloversville through Johnstown to Fonda and being extended to Tribes Hill.

Following the consolidation the electric lines were extended and now, in addition to the steam road referred to, there is an electric line paralleling the steam road from Gloversville south to Fonda, 8.7 miles, and an electric line from Gloversville, through Johnstown, Tribes Hill, and Amsterdam, southeast to Schenectady, 32.5 miles. In addition there are two short branches, one electric and one steam. Between Tribes Hill and Schenectady respondent's electric line closely parallels the line of the New York Central Railroad.

Respondent operates steam freight trains throughout the year, and steam passenger trains during two months in the summer, between Fonda and Northville; at other seasons it operates steam passenger trains north of Gloversville only. The electric division between Gloversville and Schenectady is devoted almost exclusively to passenger traffic. Interline tickets are sold only at Johnstown, Gloversville, and points north thereof. Baggage is handled only between Northville and Fonda, but by an arrangement with the New York Central baggage is accepted by that line at Fonda although passengers may travel over respondent's line by way

of Schenectady. Respondent operates no parlor or sleeping cars and handles a negligible amount of milk and cream. During 1919 but 146,762 passengers were handled over the steam division, as compared with 6,380,973 over the electric division. Respondent's total passenger revenue for the year 1920 was $886,667.59. The interstate passenger business yielded only $1,107.15 of this, or less than 0.25 per cent.

Respondent was not among the carriers upon whose petition this proceeding was originally instituted, and upon further hearing made no showing of necessity for increasing its passenger fares to the basis of 3.6 cents per mile. Our original order in this case applied to the carriers named only " as they respectively participate in the transportation." Respondent does not " participate in the transportation " as that term is used in the order. The order will accordingly be modified by striking respondent's corporate title therefrom.

COMMISSIONER DANIELS dissents.

ORDER.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 4th day of October, A. D. 1921.

No. 11623.

In the Matter of Rates, Fares, and Charges of the New York Central Railroad Company and Other Railroad Companies in the State of New York.

It appearing, That on November 13, 1920, the Commission entered its original report and order in the above-entitled proceeding, and that on February 19, 1921, this proceeding was reopened for further consideration of the intrastate rates, fares, and charges of the Fonda, Johnstown & Gloversville Railroad Company between points in the state of New York;

It further appearing, That a further hearing has been had, and that the Commission, on the date hereof, has made and filed a report on further hearing containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the said order of November 13, 1920, be, and it is hereby, modified by striking therefrom the corporate title of the carrier, Fonda, Johnstown & Gloversville Railroad Company, referred to in the first paragraph hereof.

By the Commission.

[SEAL] GEORGE B. MCGINTY,
Secretary.

It had previously amended the New York order with all the consequences of delegation of power to the carriers pointed out in the Second Supplemental Brief filed *Amici Curiae* on behalf of forty-two states in the Wisconsin case.

This amendment to the order is as follows:

ORDER.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 29th day of March, A. D. 1921.

No. 11623.

In the Matter of Rates, Fares, and Charges of The New York Central Railroad Company and Other Railroad Companies in the State of New York.

The report and order heretofore made and entered in this proceeding on the 13th day of November, 1920, being under consideration, which said report is hereby referred to and made a part hereof:

It is ordered, That said order entered herein on the 13th day of November, 1920, be, and it is hereby amended by inserting therein after the third paragraph beginning "It is further ordered" and before the next ensuing paragraph beginning "It is further ordered," the following additional paragraph, to wit:

"*It is further ordered,* That nothing in this order shall be construed as requiring any common carrier to establish, put in force or maintain any rates, fare or charge for the transportation of passengers or property in intrastate

commerce which is greater than its corresponding rate, fare or charge applicable to the transportation of passengers or property in interstate commerce from, to or at the same points in effect on said 13th day of November, 1920, or greater than its corresponding rate, fare or charge contemporaneously in effect and applicable to the transportation of passengers or property in interstate commerce."

It is further ordered, That in all other respects said order entered November 13, 1920, shall remain in full force and effect.

And it is further ordered, That a copy of this amendatory order be served upon each of the common carriers named in said order of November 13, 1920, parties to this proceeding.

By the Commission:

GEORGE B. McGINTY,
Secretary.

(Seal)

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Conditions on Long Island

In this connection we respectfully request that the court read the opinion of Mr. Justice Benedict of the New York Supreme Court as found in *People* v. *Long Island R. R. Co., etc.,* 113 Misc. 700; 185 N. Y. Sup. 594, but reversed in 195 App. Div. 897; 186 N. Y. Supp. 594. This is cited upon our main brief at page 13. The termini and location of all the other roads covered

in the I. C. C. order are shown at pages 214–227 of this record.

Power of a State to share jurisdiction over Interstate Commerce by reason of its reserved power over its corporations. Page 77 of main brief

In *Erie Railroad* v. *New York*, 233 U. S. 671, the question was reserved as to whether or not a State may not share or even displace the power of Congress over interstate commerce by reason of the authority of the State reserved under the 10th amendment to create corporations. See, also, *Mo. Pac. Ry. Co.* v. *Kansas*, 216 U. S. 262; *Atlantic Coast Line Co.* v. *N. Car. Corp. Comm.*, 206 U. S. 1. We of course claim not only our property in this contract, but also assert that the orders complained of interfere with the powers of the State.

As to the power of the State, we direct attention to the excerpt from the Minnesota Rate Cases printed at page 106 of our main brief.

As to our property in the contract, we direct attention to the letter of Hon. Charles E. Hughes dated September 19, 1919, published in the Hearings before the House Committee.

The railroads should have exhausted their remedies before State tribunals. Page 110 of main brief

Upon the argument the proposition was discussed as to whether or not we might not look to the Interstate Commerce Commission, rather than to this Honorable Court for repair of any unlawful or unconstitutional action.

Our experience in the Fonda, Johnstown & Gloversville case where the proceeding was reopened has taught us that we may not rely upon any such " practical " remedy. There our plea that the order be vacated as to all the other roads which did not appear in the proceeding was ignored.

It seems this court has determined that primary resort should be made by the carriers to State authority, rather than that original jurisdiction should be deemed existent in the Interstate Commerce Commission. Granting, only for the sake of argument, that the Federal administrative officers have any appellate power, we submit that the resort to the primary jurisdiction of the States should have been complete and not partial as it was in this case.

In this connection we call attention to the opinion of the Court by Mr. Justice Holmes in *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210.

Albany, N. Y., October 22, 1921.

Respectfully submitted.

CHARLES D. NEWTON,
Attorney-General of New York.

EDWARD G. GRIFFIN,
Deputy Attorney-General.

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Supreme Court of the United States

OCTOBER TERM, 1921.

No. 283.

THE STATE OF NEW YORK AND CHARLES D. NEWTON, PERSONALLY AND AS ATTORNEY GENERAL OF THE STATE OF NEW YORK, *Appellants,*

vs.

THE UNITED STATES, THE INTERSTATE COMMERCE COMMISSION, AND INTERVENING DEFENDANTS, LEHIGH VALLEY RAILROAD COMPANY, THE LEHIGH & HUDSON RIVER RAILWAY COMPANY, NEW YORK, ONTARIO & WESTERN RAILWAY COMPANY, ERIE RAILROAD COMPANY, NEW JERSEY AND NEW YORK RAILROAD COMPANY, DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, THE DELAWARE AND HUDSON COMPANY, GREENWICH & JOHNSONVILLE RAILWAY COMPANY, SCHOHARIE VALLEY RAILWAY COMPANY, *Appellees.*

Appeal from the District Court of the United States for the Northern District of New York.

BRIEF FOR INTERVENING DEFENDANTS.

STATEMENT.

Subject Matter.

This suit involves in its immediate aspect the validity of certain intrastate rates, fares and

charges for the transportation of passengers, milk and cream, excess baggage and space in sleeping and parlor cars within the State of New York. It involves in its broad aspect the constitutionality and interpretation of the Transportation Act, 1920.

Pleadings.

The suit is in equity by bill filed January 6, 1921, in the District Court of the United States for the Northern District of New York praying for interlocutory and permanent injunctions to restrain the United States and the Interstate Commerce Commission from the enforcement and execution of the report, findings and order of said Commission made on November 13, 1920, and entitled "*In the Matter of Rates, Fares, and Charges of the New York Central Railroad Company and other Railroad Companies in the State of New York.*" (1. C. C. Docket No. 11623, 59 I. C. C. 290.)

An injunction was also prayed for to restrain the defendants from bringing any proceeding against the railroad companies joined in said order of the Commission to compel its enforcement and execution or from interfering with the enforcement of the laws and constitution of the State of New York.

The bill also prayed that the Court adjudge and declare subdivisions (3) and (4) of Section 13 and Section 15a of the Interstate Commerce Act (as added by Sections 416 and 422 respectively of the Transportation Act, 1920) null and void, as being unconstitutional.

An order to show cause was issued returnable January 22, 1921, before Hon. Martin T. Manton, Circuit Judge, and Hon. John R. Hazel and Hon. George W. Ray, District Judges. All the defendants filed answers, and the hearing on the order to show cause was adjourned from time to time until February 19, 1921, when said intervenors were given leave to intervene as parties defendant. On the same day final hearing was had on bill, answers, affidavits and exhibits and the case was taken under advisement by the Court, whose decision was filed February 22nd, 1921.

On March 1, 1921, the Court entered a final decree denying the prayers of the plaintiffs for the injunctive and other relief and dismissing the bill for want of equity, at the cost of the plaintiffs (*Lehigh Valley R. Co.* v. *Public Service Commission*, 272 Fed. 758).

It is an appeal from this final decree that is now before this Court in this case.

The background of this case is similar to that of several other cases before this Court involving intrastate rates in Wisconsin and other States.

Issues.

The issues of the case as raised by the pleadings are reducible to one general question, viz: the validity of Sections 416 and 422 of the Transportation Act, 1920, amending Section 13 of the Interstate Commerce Act, and adding Section 15a thereto and the interpretation thereof by the Interstate Commerce Commission in its decision in the proceeding aforesaid (I. C. C. Docket No. 11623). The following cases involved the same

question and were decided by the Interstate Commerce Commission the same way:—

Arizona Rates, Fares and Charges, 61 I. C. C. 572;
Arkansas Rates and Fares, 59 I. C. C. 471;
Florida Rates, Fares and Charges, 60 I. C. C. 551;
Georgia Rates, Fares and Charges, 60 I. C. C. 527;
Re Intrastate Rates within the State of Illinois, 59 I. C. C. 350;
Indiana Rates, Fares and Charges, 60 I. C. C. 337; 62 I. C. C. 648;
Kansas Rates, Fares and Charges, 62 I. C. C. 440;
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North Carolina Fares and Charges, 60 I. C. C. 362;
Ohio Rates, Fares and Charges, 60 I. C. C. 78;

South Carolina Fares and Charges, 60 I. C. C. 290;
Re Intrastate rates within the State of Texas, 60 I. C. C. 421;
Utah Rates, Fares and Charges, 60 I. C. C. 388;
Wisconsin Passenger Fares, 59 I. C. C. 391.

Stated differently, and perhaps more to the point, the question is whether Congress has power to grant and has granted to the Interstate Commerce Commission authority to control intrastate rates to the extent necessary to remove discriminations laid upon interstate commerce under color of State authority over intrastate rates.

Federal Control.

On December 28th, 1917, the railroads of the intervening defendants were taken over by the Government under the provisions of an Act authorizing, as a war measure, the President to assume control of the transportation systems of the country (39 Stat. 645. Comp. Stat. 1918, Sec. 1974a) and were operated by the Director General of Railroads in accordance therewith and with the provisions of an Act approved March 21, 1918, known as the "Federal Control Act" (40 Stat. 451, Comp. Stat. 1918, Sections 3115-¾p), until returned on March 1st, 1920.

While said railroads were under federal control, the President, pursuant to powers conferred by the Federal Control Act, initiated certain rates and fares for the transportation of passengers

and property over said railroads, which were promulgated by the Director General, by General Order No. 28, effective June 10, 1918. This order raised all passenger fares on said railroads to three cents per mile (with certain exceptions not here involved), and said rates and fares were in force on February 29, 1920.

Transportation Act, 1920.

Section 422 of the Transportation Act, 1920, amended the Interstate Commerce Act by adding, among other things, a new section, known as Section 15a, of which paragraphs (2) and (3) read as follows:

> "(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in ~~each of~~ such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: Provided. That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.
>
> "(3) The Commission shall from time to time determine and make public what per-

centage of such aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission. In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation: Provided, That during the two years beginning March 1, 1920, the Commission shall take as such fair return a sum equal to 5½ per centum of such aggregate value, but may, in its discretion, add thereto a sum not exceeding one-half of one per centum of such aggregate value to make provision in whole or in part for improvements, betterments or equipment, which, according to the accounting system prescribed by the commission, are chargeable to capital account."

Ex Parte 74.

Pursuant to the above authority, the Interstate Commerce Commission held hearings entitled *"In the matter of the applications of carriers in Official, Southern and Western Classification Territories for authority to increase rates"* (*Ex Parte* 74. 58 I. C. C. 220), and, on July 29th, 1920, made its findings, filed its report and issued its order increasing all outstanding rates.

As required by the Act, the Commission divided the railroads of the country into groups, namely, Eastern, Southern, Western, and Moun-

tain Pacific. It found that in order to produce rates in the Eastern Group (with which alone this case is concerned) not unreasonable in the aggregate, that would enable the carriers therein under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, to earn an aggregate annual net railway operating income equal, as nearly as may be, to a return of five and one-half per cent upon the aggregate value of their railway property used in the service of transportation, and one-half of one per cent in addition, it would be necessary to make a general increase in freight rates of 40 per cent and as to the rates involved in this case found and determined:

(1) that all passenger fares and charges might be increased 20 per cent; (2) that excess baggage rates might be increased 20 per cent; (3) that a surcharge upon passengers in sleeping and parlor cars might be made amounting to 50 per cent of the charge for the space in such cars, and (4) that rates on milk and cream might be increased 20 per cent.

Intrastate Traffic.

Realizing the possible conflict between State and federal rate regulating authorities and that exclusive federal regulation was essential where intrastate rate levels might create discriminations against interstate commerce, Congress incorporated in the Transportation Act, Section 416, amending Section 13 of the Interstate Commerce Act by adding thereto paragraphs (3) and (4), reading as follows:

"(3) Whenever in any investigation under

the provisions of this Act, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this Act with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the co-operation, services, records, and facilities of such State authorities in the enforcement of any provision of this Act.

"(4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and inter-

state or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

After the Interstate Commerce Commission rendered its decision and issued its order in *Ex Parte* 74, following hearings held in accordance with the above provisions, these intervening defendants (among others) made application to the Public Service Commission, Second District, of the State of New York, for permission to file tariff supplements providing increases in the rates, fares, and charges applicable to intrastate traffic in the State of New York, corresponding with those authorized by the Interstate Commerce Commission in *Ex Parte* 74, for interstate traffic. So far as that application related to rates and charges for the transportation of freight, except milk, it was granted by an order dated August 19, 1920 (9 N. Y. P. S. C. Rep. 460), and such increases, both on interstate and intrastate freight, became effective August 26, 1920. But so far as

said application related to passenger fares, sleeping-car and parlor-car fares, baggage charges, and rates on milk and cream, it was denied. (9 N. Y. P. S. C. Rep. 467.)

Thereupon the intervening defendants and other New York carriers filed with the Interstate Commerce Commission a petition for relief in accordance with the provisions of Section 13, paragraphs (3) and (4), above quoted. A hearing upon that petition was held on October 11, 1920, and on November 13, 1920, the Commission made its findings and issued its order above referred to increasing fares and charges. I. C. C. Docket No. 11623, 59 I. C. C. 290. The findings of the Commission (Rec. p. 197) with respect to passenger fares and baggage charges follow:

> "Subject to the above reservation in the matter of commutation fares and commutation baggage charges, we are of the opinion and find that the increases made by the carriers under *Ex Parte* 74, relating to passenger fares and baggage charges, and now in effect, result in reasonable passenger fares and baggage charges for interstate transportation within the territory involved in this proceeding, and that the failure of the carriers within the State of New York to increase the standard intrastate fares and charges correspondingly has resulted in the past and will result in the future: In intrastate fares and charges lower than the corresponding interstate fares and charges; in undue prejudice to persons traveling in interstate commerce within the State of New York and between points in the State of New York and points in other states; in undue preference and advantage to persons traveling in-

trastate in New York, and in unjust discrimination against interstate commerce.

We further find that said undue prejudice and unjust discrimination should be removed by making increases in said intrastate passenger fares and baggage charges which shall correspond with the increases heretofore made as aforesaid in interstate passenger fares and baggage charges."

The Commission made similar findings with respect to the increases made by the carriers under *Ex Parte* 74 relating to space occupied by passengers in sleeping and parlor cars and to rates on milk and cream and with respect to the removal of discriminations found to exist by the increase of intrastate charges to conform to interstate charges. The Commission also made the following important finding:

> "We further find that, whether the aforesaid passenger fares, baggage charges, surcharges, or rates on milk and cream pertain to transportation in interstate commerce or to transportation in intrastate commerce, the transportation services, in each instance, are performed by the carriers under substantially similar circumstances and conditions."

The order of the Commission, which was directed to all of the railroad companies joined in the proceeding, including these intervening defendants, made effective the findings aforesaid and directed the carriers to cease and desist from practising the undue discriminations found to exist and to put in force increases in intrastate passenger and excess baggage rates and fares, charges for parlor and sleeping car space and milk and

cream rates corresponding with the increases made effective as to interstate traffic under *Ex Parte* 74.

These intervening defendants accordingly, on November 29, 1920, put into full force and effect, rates, fares and charges in compliance with said order.

Legal History of the Case.

On November 26, 1920, the Attorney General of the State of New York, acting in the name of the State, filed a bill in equity in the State Supreme Court (Albany County), against these intervening defendants, and other carriers, praying for injunctions restraining them from putting into effect the aforesaid rates, fares and charges for intrastate transportation, or any rates, fares or charges higher than the maximum contained in the schedules of rates, fares and charges lawfully in effect prior to May 28, 1918, unless the same should have been approved by the authorities of the State of New York.

A temporary injunction was issued in this suit and a rule to show cause granted returnable on December 4, 1920. Said injunction was vacated on December 18, 1920, by oral opinion unreported.

As said injunction was not duly served upon certain of these intervening defendants they brought, on various dates between December 11 and 22, 1920, suits in the District Court for the Northern District of New York against the Public Service Commission, Second District, of the State of New York, said Attorney General, and certain other persons, alleging the circumstances above enumerated, and praying for injunctions restrain-

ing the defendants from commencing any proceedings to enforce the provisions of the laws of New York against them by reason of anything done or omitted under the authority of said order of the Interstate Commerce Commission, and from interfering with the charging and collecting of the intrastate rates, fares and charges which they had established in compliance with the said order. Said bills also prayed for judgment declaring null and void the provisions of the Railroad and Public Service Commission laws of the State of New York to the extent that their enforcement would bring them into conflict with the Interstate Commerce Act, said report and order, and the constitutional rights of the plaintiffs.

A temporary restraining order was issued in each of these cases, and a rule was also granted directing the defendants to show cause why an interlocutory injunction should not be issued. The several defendants appeared and joined issue on the allegations of the several complaints. (The intervening defendants who had been served in said State Court action brought similar suits against the New York officials as soon as the injunction in said action was dissolved and said suits proceeded with the others.)

The above cases were consolidated and came on for hearing on February 19, 1921, together with the present case, and were determined by the same decision of the court below (272 Fed. 758). On March 1, 1921, an interlocutory injunction was issued restraining the defendants therein according to the prayers of the respective bills of complaint. No appeal from this order has been taken.

It was because the suits brought by these inter-

vening defendants involved the same questions of fact and law as the suit now before this Court, that the Court below gave them leave to intervene in this suit.

ARGUMENT.

I.

The power of Congress to regulate commerce is plenary. It is a unitary power and is to prescribe the rules and all the rules by which commerce is to be governed.

The power of Congress under the commerce clause of the constitution is broad and sweeping. When exercised it becomes dominant and exclusive. In the domain of commerce the power of the State recedes as the federal power is exercised. This is true not only as applied to interstate commerce, but also to intrastate commerce when it is so related to interstate commerce that, in the interest of the latter, its supervision becomes necessary. That power exists to prescribe new intrastate rates and charges whenever those existing are found to discriminate against persons or places in interstate commerce is well settled by a long line of decisions of this Court, among which the following are especially familiar:

Minnesota Rate Cases, 230 U. S. 352;
Houston, etc., R. Co. v. *United States* (Shreveport Case), 234 U. S. 342;
Gulf, Col. & S. F. R. Co. v. *Hefley*, 158 U. S. 98;
Northern Pacific Ry. Co. v. *North Dakota*, 250 U. S. 135;

Illinois Central R. R. Co. v. *Public Utility Comm.*, 245 U. S. 493;
American Express Co. v. *Caldwell*, 244 U. S. 617.

Some of these cases (notably the *Shreveport Case*) involved the power of the Interstate Commerce Commission, as conferred by Congress (Secs. 3, 13 and 15 of the Interstate Commerce Act), to remove any undue or unreasonable preference, prejudice or advantage to any particular locality, or any particular description of traffic, by exercising control over intrastate rates. And this Court in that case broadly held that where in dealing with such discriminations the interstate and intrastate transactions are so related that the government of one involves the control of the other it is for Congress and not the State to prescribe the final and dominant rule. Thus this Court said in that case (p. 350):

> "It is unnecessary to repeat what has frequently been said by this court with respect to the complete and paramount character of the power confided to Congress to regulate commerce among the several States. It is of the essence of this power that, where it exists, it dominates. Interstate trade was not left to be destroyed or impeded by the rivalries of local governments. The purpose was to make impossible the recurrence of the evils which had overwhelmed the confederation and to provide the necessary basis of national unity by insuring 'uniformity of regulation against conflicting and discriminating state legislation.' By virtue of the comprehensive terms of the grant, the authority of Congress is at all times adequate to

> meet the varying exigencies that arise and to protect the national interest by securing the freedom of interstate commercial intercourse from local control. * * * Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field."

In *Illinois Central R. R. Co.* vs. *Public Utility Commission*, 245 U. S. 493, 506, this Court clearly recognized the authority of Congress to control an entire body of State rates even under the Interstate Commerce Act:

> "Upon full consideration it there was held (*Shreveport* case):
>
> "1. Under the Commerce Clause of the constitution Congress has ample power to prevent the common instrumentalities of interstate and intrastate commerce such as the railroads from being used in their intrastate operations in such manner as to affect injuriously traffic which is interstate.
>
> "2. Where unjust discrimination against interstate commerce arises out of the relation of intrastate to interstate rates this power may be exerted to remove the discrimination. * * *
>
> "3. In correcting such discrimination Congress is not restricted to an adjustment or reduction of the interstate rates but may prescribe a reasonable standard to which they

shall conform and *require the carrier to adjust the intrastate rates in such way as to remove the discrimination; for where the interstate and intrastate transactions of carriers are so related that the effective regulation of one involves control of the other it is Congress and not the State, that is entitled to prescribe the dominant rule.*"

* * * * * * *

"The parties differ widely about the scope of the order. The carriers assert that it covers *every intrastate passenger rate* in Illinois, is addressed to the removal of discrimination found to *be state-wide*, and gives ample authority for increasing all rates between points in Illinois from 2 cents to 2.4 cents per mile. On the other hand the State authorities assert that it is not state-wide, and that the extent to which it is intended to affect the state-made rates is so indefinitely and vaguely stated as to make it inoperative and of no effect as to them. *Of course the Commission could adjust the remedy to the evil and make the order as broad as the wrongful discrimination;* * * * but the extent of the discrimination found and of the remedy applied must be gathered from the reports and order of the Commission. * * * *Had the Commission regarded the discrimination as state-wide it is but reasonable to believe that it would have said so in its findings.* And had it intended to require or authorize a state-wide readjustment of the intrastate rates it doubtless would have given direct expression to that purpose which easily could have been done in a few lines." (Italics ours.)

The same question of the powers of Congress over intrastate commerce when intermingled with

or affecting interstate commerce, but coming up in a different way, had arisen earlier in the *Minnesota Rate Case* (230 U. S. 352). In that case this Court said (p. 398):

> "The completely internal commerce of a State, then, may be considered as reserved for the State itself. This reservation to the States manifestly is only of that authority which is consistent with and not opposed to the grant to Congress. There is no room in our scheme of government for the assertion of state power in hostility to the authorized exercise of federal power. The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the Nation may deal with the internal concerns of the State, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere."

It is also fundamental that the power to regulate commerce "implies by its nature full power over the thing to be regulated; it excludes, necessarily, the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying

to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole." (*Gibbons* v. *Ogden,* 9 Wheat. 1, 209.)

Again quoting from the *Minnesota Rate Case* (pp. 398, 399):

> "The general principles governing the exercise of state authority when interstate commerce is affected are well established. The power of Congress to regulate commerce among the several States is supreme and plenary. It is 'complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.' *Gibbons* v. *Ogden,* 9 Wheat. 1, 196. The conviction of its necessity sprang from the disastrous experiences under the Confederation when the States vied in discriminatory measures against each other. In order to end these evils, the grant in the Constitution conferred upon Congress an authority at all times adequate to secure the freedom of interstate commercial intercourse from state control and to provide effective regulation of that intercourse as the national interest may demand. * * *"

II.

The extent to which the adequate control of interstate commerce requires the regulation of intrastate commerce is for the determination of Congress. The Transportation Act expresses the judgment of Congress in such matter.

In the *Minnesota Rate Case* (230 U. S. 352, 432),

from the opinion in which we have already quoted, this Court also said:

> "The interblending of operations in the conduct of interstate and local business by interstate carriers is strongly pressed upon our attention * * * but these considerations are for the practical judgment of Congress in determining the extent of the regulation necessary under existing conditions of transportation to conserve and promote the interests of interstate commerce. If the situation has become such, by reason of the interblending of the interstate and intrastate operations of interstate carriers, that adequate regulation of their interstate rates cannot be maintained without imposing requirements with respect to their intrastate rates which substantially affect the former, it is for Congress to determine, within the limits of its constitutional authority over interstate commerce and its instruments the measure of the regulation it should supply. It is the function of this court to interpret and apply the law already enacted, but not under the guise of construction to provide a more comprehensive scheme of regulation than Congress has decided upon. Nor in the absence of federal action, may we deny effect to the laws of the state enacted within the field which it is entitled to occupy until its authority is limited through the exertion by Congress of its paramount constitutional power."

The full power of Congress to regulate intrastate commerce when necessary to the adequate regulation of interstate commerce was thus broadly recognized, but at the time of the *Minnesota*

Rate Case it had been exercised only in limited degree.

Manifestly the Transportation Act, 1920, was enacted as a measure of regulation over intrastate rates and the first inquiry might properly be whether it is confined to putting into statutory form the enunciations of this Court in the Minnesota and Shreveport cases as applied to situations similar to those under consideration in such cases or whether it goes further and constitutes a congressional enactment covering the field of the regulation of commerce, both intrastate and interstate, when the one is so related to the other as to require such action—in other words whether Congress has conferred upon the Interstate Commerce Commission the power over the field of State regulation which in the language of the Minnesota decision "thus far" had not been granted.

Before considering the question thus outlined, however, we urge that, assuming even that the Transportation Act merely serves to put the existing law regarding discriminations into statutory form, the facts shown in this record establish discriminations with respect to persons and places and for that reason alone are sufficient to sustain the order in question.

Stating the matter in another way: The Transportation Act grants to the Interstate Commerce Commission the power to act whenever after investigation it shall find that any intrastate rate or fare causes

> "any undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce on the one hand, and interstate or foreign commerce on the other hand."

It also adds the following significant provision not theretofore contained in any statute.

> "or any undue, unreasonable or unjust discrimination against interstate or foreign commerce."

Without laying stress at this point upon the clause just quoted we shall now consider whether the record before the Interstate Commerce Commission showed discriminations between persons and localities in interstate commerce on the one hand and intrastate commerce on the other. If such discriminations are shown the order of the Commission in question should be sustained even if the clause last referred to is given no weight.

III.

The findings of the Commission that discriminations between persons and places in intrastate commerce on the one hand and interstate commerce on the other existed were based upon evidence before it and are conclusive. The order in question may be sustained on this account alone.

The evils which the Commission is directed by Section 416 of the Transportation Act to remedy are (1) undue or unreasonable advantages, preferences or prejudices as between persons or localities in intrastate commerce on the one hand and interstate commerce on the other, and (2) undue, unreasonable or unjust discrimination against interstate commerce. And the decisions of this Court to which we have referred construing earlier laws demonstrate beyond doubt

the constitutionality of the Act in the first aspect. Undue and unreasonable preferences and discriminations between persons and localities have been prohibited by the Interstate Commerce Act since its original enactment. Consequently we may properly postpone an examination of the constitutionality and application of the new provision relating to discriminations against interstate commerce itself. As we view it, the order of the Commission may be sustained as based upon discriminations between persons and places alone.

The new sections added by the Transportation Act do not annul the provisions of the Interstate Commerce Act which were under consideration in the *Shreveport Case*, but supplement them. As the law now stands discriminations and preferences with respect to persons and places are expressly forbidden and the Commission is directed to remove them when found to exist, regardless of State laws and the orders of State authorities.

At the hearing before the Interstate Commerce Commission detailed evidence was adduced as to the undue advantage, preference and prejudice as between persons and localities in intrastate commerce in the State of New York on the one hand and in interstate commerce on the other. A summary of the evidence so presented to the Commission is printed as an Appendix to this brief. This summary shows clearly discriminations between persons and places in interstate commerce and those in intrastate commerce. Many illustrations of such discriminations are shown.

It should be added that all the evidence which was before the Interstate Commerce Commission

in the New York case (No. 11623) in which the order now in question was made does not appear in the present record. The record in *Ex Parte* 74 was introduced in that case (Rec. p. 419) and was offered and admitted by the Court below in the present case (Rec. p. 304) and yet it has not been included by the appellants in the record here. In that respect the present record is incomplete.

While the Commission in making its order had before it evidence of many specific discriminations the general situation itself showed the existence of discrimination. The fact alone that two classes of passengers, intrastate and interstate, receiving similar service pay different rates per mile establishes it. Length of haul, in the case of freight rates, has sometimes been considered a factor in the making of a proper rate per ton mile; this upon the wholesale principle. The distinction between intrastate and interstate passenger fares, however, involves no consideration of distance traveled. The interstate passenger may travel a longer or a shorter distance than the intrastate one. The higher interstate rate may be paid by a passenger traveling ten miles across the State boundary while the lower interstate rate may apply to a journey of a hundred miles. Passenger fares being upon a mileage basis, distance traveled is not a factor; but if it were, the interstate fares would ordinarily be lower than the intrastate, not higher.

It has been conceded that all of the railroads named in the Commission's order, including these intervening defendants, were engaged in interstate commerce even though the lines of some of them did not extend outside of the State of New

York. It is also shown by the evidence that upon all of these lines intrastate and interstate passengers are afforded substantially the same facilities; in fact, are generally carried in the same trains.

All these facts and the evidence supporting them were before the Commission and it made its findings and order upon the testimony and the tariffs filed with it. It summarized the testimony, giving examples of specific discriminations, and then followed with the findings referred to in an earlier part of this brief.

The Commission found with respect to each class of rates involved, not only that there was unjust discrimination against interstate commerce, but that there were unjust advantages, preferences and prejudices as between persons and localities in intrastate and interstate commerce and that the transportation conditions were substantially similar.

There can be no question but that there was evidence before the Commission to sustain its findings and order and, consequently, they are conclusive under the well established rule. From the large number of decisions of this Court, stating such rule, the following may be selected:

In *Manufacturers Railway* v. *United States*, 246 U. S. 457, this Court said (page 481):

> "Whether a preference or advantage or discrimination is undue or unreasonable or unjust is one of those questions of fact that have been confided by Congress to the judgment and discretion of the Commission (*Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 170), and upon which its decisions, made the basis of

> administrative orders operating *in futuro*, are not to be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power."

In *Seaboard Air Line Ry.* v. *United States*, 254 U. S. 57, 62, it was said:

> "Moreover the determination of questions of fact is by law imposed upon the Commission, a body created by statute for the consideration of this and like matters. The findings of fact by the Commission upon such questions can be disturbed by judicial decree only in cases where their action is arbitrary or transcends the legitimate bounds of their authority."

See also *Los Angeles Switching Case*, 234 U. S. 294; *Kansas City Southern R. Co.* v. *United States*, 231 U. S. 423; *Skinner & Eddy Corpn.* v. *United States*, 249 U. S. 557.

Another consideration should be pointed out in this connection: Thus far in this point it has been sought to show that the order of the Interstate Commerce Commission was justified by evidence establishing an undue advantage of intrastate traffic over interstate traffic and unjust discrimination between persons and localities enjoying low intrastate rates, on the one hand, and those having to pay higher interstate rates on the other hand. But this is not all. We claim for the interstate carriers themselves the benefit of the statutory prohibition against discriminations as between persons in intrastate commerce and those in interstate commerce. The intervening defend-

ants are persons in every legal sense and the possibility of discrimination against them is manifest. Thus, for illustration, three of them are directly, and the others indirectly, in competition with the New York Central Railroad between Buffalo, and intermediate cities, and New York City, and between many other points in New York State. Over the New York Central all the traffic between these points moves intrastate, while on the railroads of the intervening defendants, most of it moves interstate (Record 88). If the State of New York could hold down the rates of the intrastate line it is plain that the interstate lines would have few passengers and little traffic between such competitive points. This would create unreasonable prejudice against the interstate railroads.

For these reasons, it is submitted that the order and findings of the Interstate Commerce Commission in question may be sustained as removing discriminations between persons and places, even without resorting to the broad provision of the amended statute prohibiting, without qualification, all unjust discriminations against interstate commerce itself.

IV.

The Transportation Act goes much further than to provide for the removal of discriminations against persons and places in interstate commerce. Its aim is the protection and development of interstate commerce itself and it deals with discriminations against it.

The power to regulate commerce is to enact ap-

propriate legislation for its protection and advancement, including that directed to securing the continued and efficient operation of carriers as instruments of commerce.

In the *Shreveport Case* this Court further said (p. 351):

> "Congress is empowered to regulate,—that is, to provide the law for the government of interstate commerce; to enact 'all appropriate legislation' for its 'protection and advancement' (*The Daniel Ball*, 10 Wall. 557, 564); to adopt measures 'to promote its growth and insure its safety' (*County of Mobile* v. *Kimball, supra*); 'to foster, protect, control and restrain' (*Second Employers' Liability Cases, Supra*). Its authority, extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance. As it is competent for Congress to legislate to these ends, unquestionably it may seek their attainment by requiring that the agencies of interstate commerce shall not be used in such manner as to cripple, retard or destroy it. The fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter or preclude the Federal power from being exerted to prevent the intrastate opera-

> tions of such carriers from being made a means of injury to that which has been confided to Federal care."

It follows from these principles that Congress under the commerce clause has full authority to enact legislation authorizing the Interstate Commerce Commission to fix rates which will afford carriers a proper return upon their investments. Such legislation might be directed to particular carriers or to groups of carriers and might deal with individual rates or with the whole body of rates.

Undoubtedly this power would go so far as to warrant a provision for a return on railroad investments far above the point of non-confiscation and adequate to attract new capital into such enterprises. It is not necessary, however, to go to such extent in order to sustain the Transportation Act which in effect amounts no more than to a statutory inhibition against confiscation. And certainly there is a duty upon the part of Congress to go at least that far. Its power to regulate the rates and fares of common carriers engaged in interstate commerce is well settled and that power carries with it the reciprocal duty of permitting rates and fares affording a just return.

Prior to the Transportation Act the carriers had been protected against confiscation only by the constitution, as applied and interpreted by the courts in a long list of cases of which *Willcox* v. *Consolidated Gas Company*, 212 U. S. 19, is typical. In that case this Court said (at p. 49):

> "Under the circumstances, the Court (below) held that a rate which would permit a

> return of six per cent. would be enough to avoid the charge of confiscation, and for the reason that a return of such an amount was the return ordinarily sought and obtained on investments of that degree of safety in the City of New York.
>
> Taking all facts into consideration, we concur with the Court below on this question, and think complainant is entitled to six per cent. on the fair value of its property devoted to public use."

In *Lincoln Gas Co.* v. *Lincoln*, 250 U. S. 256, eight per cent was recognized as the minimum return.

As will be shown, the Transportation Act in providing for a fair return goes no further—although we think it might—than to define by statute what had long been recognized as the law of the land under the constitution. And this is all in the public interest and for the public benefit.

It is hardly necessary, in this place, to go into the conditions, physical or financial, in which the carriers found themselves at the end of federal control. That is well known and needs no discussion. Congress realized the situation. In Section 210 of the Transportation Act, it authorized government loans "for the purpose of enabling carriers by railroad subject to the Interstate Commerce Act properly to serve the public during the transition period."

This realization by Congress inspired the enactment of Section 422 (and other sections) of the Transportation Act. The condition of the carriers was a matter of the public moment. It was of

vital importance that interstate commerce should not be interrupted.

> "That the business of common carriers by rail is in a sense a public business because of the interest of society in the continued operation and rightful conduct of such business and that the public interest begets a public right of regulation to the full extent necessary to secure and protect it, is settled by so many decisions, state and federal, and is illustrated by such a continuous exertion of state and federal legislative power as to leave no room for question on the subject" (*Wilson* v. *New*, 243 U. S. 332, 347).

Congress, in enacting the provisions of the Transportation Act regarding the return to the carriers, seems to have been solicitous to follow and prescribe the bases laid down by the courts. It directed the Interstate Commerce Commission to prescribe just and reasonable rates that would under honest, efficient and economical management, earn a fair return upon the aggregate value of the railway property held for and used in the service of transportation. (Sec. 422 (2).) This was in strict accord with the rule laid down in the *Willcox* case.

Congress also stated the elements to be taken into consideration in determining an adequate return (Sec. 422 (3)) following the principles stated by this Court in the *Willcox case* where it said (p. 48):

> "There is no particular rate of compensation which must in all cases and in all parts of the country be regarded as sufficient for capital invested in business enterprises. Such

> compensation must depend greatly upon circumstances and locality; among other things, the amount of risk in the business is an important factor, as well as the locality where the business is conducted."

But, realizing that the Commission could not immediately determine all of these factors, and that some reasonable return ought promptly to be established, Congress specified for a limited period of time, a return of six per cent, which is the same amount fixed by this Court in the *Willcox* case.

Congress likewise supplied (Sec. 422 (4)) the remaining element, which this Court said, in the *Willcox* case, was necessary in determining a fair return, namely the "reasonable value of the property at the time it is being used for the public." It authorized the Commission to ascertain the aggregate value of the railway property held for and used in the service of transportation.

From this discussion it appears that there is nothing radical or extraordinary about the Transportation Act in fixing a fair return for the carriers. It merely declares what this Court has on numerous occasions declared to be the law. It observes the rules laid down by this Court in prescribing the elements which should enter into the determination of an ultimate fair return, and meanwhile, as a temporary expedient, prescribes the amount which this Court said in the *Willcox* case was a fair return in an enterprise certainly involving less risk than railroad operations.

V.

Intrastate rates and fares must contribute their proportion to the fair return granted to the carriers by the Transportation Act and Congress had power so to enact.

The unity of a railway instrumentality of interstate commerce is actual and practical. There is no separation, and no possibility of separation, of facilities in the form of road-bed, terminals or signalling apparatus between those services which begin and end within the boundaries of single States and those performed over the identical tracks, in which State lines are crossed. The same locomotives, to a large extent the same cars, the same station structures, the same classification and terminal yards are used in rendering both State and interstate services. Locomotives and cars are manned by the same employees, the same signals control the train movements, the same engineering staff with the same corps of subordinates maintain the same road-bed and road-structures in aid of both classes of service. The expenses of railway management and maintenance are joint expenses, incurred for joint purposes. They are not the separate expenses of the one traffic or of the other.

It is a consequence of this unity, that an interstate railway, as an instrumentality of commerce, must receive adequate sustenance to maintain its existence as a unit for all the services it renders, or fail to receive such sustenance and be impeded in its capacity to render all the services for which it exists, both State and interstate. The same railway cannot exist as a well-nourished and ef-

ficient instrument of interstate commerce, and be at the same time an ill-nourished and inefficient instrument of intrastate commerce. Reasonable remuneration of all services rendered, not merely for some services, is essential. Deprived of such remuneration at any point, it must recoup the loss at another point, or its efficiency at all points must dwindle and ultimately become extinguished.

Giving weight to these considerations it seems manifest that for the protection of carriers as instruments of commerce Congress may not only enact legislation authorizing the Interstate Commerce Commission to fix a return which carriers shall receive from interstate traffic but may also empower it to require that intrastate traffic shall make its fair contribution thereto. The fallacious character of the argument to the contrary is apparent when it is recognized that it amounts to the assertion that, although the authority of Congress to regulate interstate commerce is complete and plenary yet that it is subject to State control and limitation—that every State by declining to permit remunerative rates within its boundaries may force the plenary authority over interstate commerce either (1) to authorize excessive rates upon interstate traffic or (2) to permit the agencies of interstate commerce to fail in efficiency through lack of the sustenance obtainable only from reasonable rates on all traffic, intrastate as well as interstate. But such alternatives so fatal to federal power are not necessary. Interstate railways as instruments of interstate commerce are subject in their entirety to federal regulation although such regulation may not be applicable to intrastate rates until actually asserted by Congress as in the Transportation Act.

To repeat: The power of Congress is national and complete. It has power to deal with the carriers as units and to require all traffic, interstate and intrastate, to contribute to the revenues necessary to provide a fair return upon the value of the whole property employed in the transportation service. It extends to the protection of interstate commerce from the practical necessity of subjection to higher charges than would be necessary if services within State boundaries were reasonably compensated.

It is not so much that interstate and intrastate rates are interdependent as that an instrumentality of commerce is a unity; its operations are incapable of separation; the mingling of interstate and intrastate commerce requires that each should bear the burden imposed by the paramount authority; dealing with interstate commerce in the matter under consideration necessarily involves dealing with intrastate commerce. And all the cases to which we have referred establish the power of Congress to go so far in the control of intrastate commerce as the necessities of interstate commerce require. This is also shown by the decisions under the Safety Appliance, Employers' Liability, Hours of Service, Boiler Inspection and other federal laws referred to by this Court in *Wilson* v. *New, supra,* (pp. 349 and 350) and in the *Shreveport Case, supra,* (pp. 352 and 353).

That Congress in enacting the Transportation Act intended that interstate and intrastate rates and fares should be adjusted and co-ordinated in such manner as to afford a fair return to the carriers upon their entire properties without

prejudice to either is manifest from the provisions of the Act. Section 422 provides:

> "In the exercise of its power to prescribe just and reasonable rates, the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will * * * earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation."
>
> * * * * * * * *
>
> "The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon * * * Provided that during the two years beginning March 1st, 1920, the Commission shall take as such fair return a sum equal to five and one half percentum of such aggregate value."

It is upon the aggregate value of the railway property held "for and used in the service of transportation" that the carrier is entitled to the income prescribed, and this means all its property so used, that employed in intrastate service as much as in interstate service.

As already stated, if intrastate rates are not so adjusted as to contribute to the return upon the value of the whole property of the carriers used for transportation, intrastate as well as interstate, the entire burden of producing the required income will be thrown upon interstate transportation, causing an undue and unjust discrimina-

tion against interstate commerce or the agency of interstate commerce will fail to obtain its fair return and, in consequence, become inefficient as such agency. And this is the condition contemplated by the Transportation Act (Sec. 416 (4)) where it is provided that the Commission may act to remove *"any undue, unreasonable or unjust discrimination against interstate or foreign commerce;"* not merely discriminations against persons or places *but against interstate commerce itself.*

The purpose to deal comprehensively with intrastate rates is also manifest from other provisions of the Act.

Section 416(3) authorizes carriers to file petitions to bring into investigation by the Interstate Commerce Commission the rates, fares and charges made or imposed by authority of any State. (This is what these intervening defendants did when the Public Service Commission of New York denied their application for increases in intrastate rates, fares and charges to correspond with those for interstate traffic authorized by the Interstate Commerce Commission in *Ex Parte* 74.)

The same section requires the Commission to give notice of said petitions to the States interested and authorizes it to hold joint hearings with State regulating bodies with respect to the relationships between rate structures and practices of carriers subject to the jurisdiction of such bodies where action by the Commission might affect the rate-making authority of the State.

Section 416(4) authorizes the Commission in case it finds that any State rate or fare is dis-

criminatory to prescribe the rate or fare to be charged in order to remove such discrimination and then contains the following important provision concerning the rates and fares prescribed by the Commission:

> "Such rates, fares, charges * * * shall be observed while in effect by the carriers parties to such proceeding affected thereby, *the law of any state or the decision or order of any state authority to the contrary notwithstanding.*" (Italics ours.)

The Interstate Commerce Commission in the present case acted in accordance with the interpretation of the Transportation Act which we have contended for. The fair return afforded by the Commission in its decision in *Ex Parte* 74 was based upon the "aggregate value" "of the entire railway property of any carrier held for and used in the service of transportation." Each and all of these intervening defendants were, as is admitted, engaged in interstate commerce. Their property used in the State of New York for intrastate commerce is identical with that used therein for interstate commerce. There was never any attempt to separate and the property was inseparable.

The rates prescribed were to be such as to yield six per cent. on the *aggregate* value of the property without any attempt to divide. And as we have already pointed out if there could have been a division or apportionment one of two alternatives must have resulted; (1) the fair return of six per cent. on interstate traffic would have been insufficient and thus the purpose of the Act would have been defeated or (2) it would have

been necessary to make the interstate rates high enough to accomplish the purpose of the legislation, with the obvious result of a burden upon interstate commerce.

The Interstate Commerce Commission, construing the Act as we have contended for, accordingly found (Docket No. 11623), that by the refusal of the New York Commission to permit the increase in intrastate fares, the annual earnings of interstate carriers operating in New York were between $11,000,000 and $12,000,000 "less than they would be if the general level of rates and fares" approved by the Commission had become effective on intrastate traffic. Thus the Commission said (Rec. p. 190):

> "In other words the annual earnings of the interstate carriers operating in New York are now between $11,000,000 and $12,000,000 less than they would be if the general level of rates and fares approved by us had become effective on intrastate traffic; and to that extent the declared purpose of Congress is defeated by a preferential basis of rates and fares maintained by authority of the State of New York."

Consequently, to enable the carriers to realize the return found by the Commission to be necessary an additional $11,000,000 or $12,000,000 would have to be imposed upon interstate traffic, if intrastate traffic should not bear its part—a result clearly discriminatory in favor of intrastate traffic, and against interstate traffic.

VI.

The Transportation Act treats Transportation from the National standpoint and constitutes a comprehensive regulation.

We have heretofore discussed the provisions of the Transportation Act particularly relevant to the questions raised in the present case. But the purposes of the Act as a whole ought to be regarded, for those purposes have a most important bearing upon all questions of validity and interpretation. The Act and all its parts should be considered in the light of that which it seeks to accomplish.

In Section 500 of the Transportation Act, Congress makes the following declaration of policy:

> "It is hereby declared to be the policy of Congress * * * to foster and preserve in full vigor both rail and water transportation."

In the past Congress has, from time to time, exercised its latent powers to regulate commerce by stretching out its dominant arm to embrace, or to enlarge its previous regulation of, particular phases of commerce, such as rates and practices, relations between carriers and shippers, locomotive construction and maintenance, safety appliances, car service, liability to injured employees, transportation of livestock and perishable freight and hours of service. The Transportation Act is the first attempt at comprehensive regulation, and relates not only to the transportation service itself, but also to the carrier as a corporation and to its officers and employees.

The reports of the Senate and House committees show the broad purposes of the Act. They indicate that certain important advantages had been realized from the unification of the railroads under federal control but state strong reasons why the carriers should continue to be privately operated. The manifest purpose was to preserve, as far as possible, under private operation the advantages which had been gained.

In Senate Report No. 304, the proposed legislation is described as relating "to future regulation of interstate carriers" and as establishing "a permanent policy with respect to the relation between the Government and our systems of transportation."

In this report under the heading, "*The policy established by the bill for future control and regulation,*" the following appears:

> "Having made clear, as it is hoped, the terms upon which the railways are to be returned to their owners for private operation under public control and regulation, the committee advances to those parts of the bill which create the permanent system for such control and regulation. In considering this phase of the subject, it should be constantly borne in mind that if our policy is to be private operation of the instrumentalities of transportation there must be a large and constant inflow of capital. As commerce increases in volume, the facilities of transportation must increase; and, without reckoning the funds which must be secured to discharge maturing obligations already in existence, it will be conceded by everybody that immense sums will be required from year to year for new construction, additional equip-

ment, and necessary improvement. The capital thus demanded must be drawn from those who have money to invest, and, of course, it must be voluntarily contributed. If the people who have money will invest it in the transportation enterprise, private ownership and operation under public control must necessarily fail. It is apparent, therefore, that any legislation which may be proposed upon the hypothesis of private ownership and operation must tender to the future investor reasonable security for the investment he is asked to make and reasonable assurance of such yearly return upon his money as will induce him to enter the field. The better the security and the more certain the return, the less will be the rate required to attract the investment.

It is here that our present system of regulation has failed."

That the "policy" to be established by the Transportation Act would require a combination of elements and a long period of time for its full development, is indicated by the following language of this report (pages 9 and 10):

> "The full advantages of the proposed policy of consolidation cannot be secured for 10 or 12 years. The railways must be returned to their owners at once. This situation makes it necessary to provide a plan for immediate relief that will tend, at least, to overcome the difficulties confronting us and render private operation possible."

The purpose to deal with transportation problems from the *national standpoint*—to treat the

railroads as a whole rather than as unrelated systems, is also shown (page 12):

> "Heretofore the regulation of transportation has been regarded merely as a restriction imposed upon particular carriers. For the first time it is proposed to look upon transportation as a subject of national concern and from a national standpoint. It is the duty of the Government so to exercise its power of regulating commerce among the States and with foreign nations, that all parts of a common country shall enjoy adequate transportation facilities at the lowest cost consistent with fairness to the capital invested and to the men who manage and operate these facilities. The commerce of one community, in these days, is deeply involved in the commerce of every community in the land. All the railways we have, or substantially all, must be maintained; and, from time to time, they must be enlarged and additional facilities must be provided."

Similar statements of the purpose of Congress to exercise a more complete control over commerce are also to be found in the House report (No. 456). Particular attention is called to the following (page 5):

> "The increasing tendency of Congress to exercise to the full the powers granted it under the commerce clause of the Constitution, and the decision of the Supreme Court of the United States in the *Shreveport* and *Minnesota Rate* cases, indicate a gradual but certain diminution of State control."

The "national concern" to treat transportation

"from a national standpoint" is further indicated by the provisions of the Transportation Act respecting the "consolidation of the railway properties of the continental United States into a limited number of systems" (Sec. 407).

Public policy, as well as the necessities of commerce, require the preservation of the Act as a whole and all its parts. Otherwise Congress cannot exercise its constitutional power to regulate commerce in a manner that will provide and preserve an efficient and adequate Transportation Service, the regularity and continuity of which the Senate Committee's report declares are "absolutely indispensable" to the lives and health of the people and the existence of our industrial and commercial welfare."

VII.

Answer to the Appellants' Brief.

Answer to the greater portion of the appellants' argument is to be found in the main portion of this brief. Only such special features as seem to call for particular attention will now be taken up.

1. The appellants contend in their brief (pp. 20-22) that there were insufficient facts before the Interstate Commerce Commission to justify its order in No. 11623. The summary of evidence contained in the Appendix refutes such contention and, besides, if the record before the Commission seems upon this record to be incomplete, only the appellants are to blame. As stated in our main brief, the record in *Ex Parte* 74 was admitted as a part of the record in 11623 (Record, p. 421) and

this was done with the express consent of the counsel for the New York Public Service Commission (Record, p. 419). It was also offered and admitted in evidence by the Court below (Record, p. 304) and yet it has not been brought up in this case.

Consequently the appellants are not in a position to question the sufficiency of the record or to cast aspersions upon the motives of the appellees in offering in evidence in the Court below what was clearly part of the record in the proceeding before the Commission (No. 11623).

2. It is also urged in the appellants' brief (p. 30), that:

> "The Commission acted arbitrarily, unjustly and unreasonably, fixing rates contrary to the evidence and without substantial evidence to support its report, findings and order."

In our main brief we have considered the question of how far this Court has, in other cases, declared its jurisdiction to review the sufficiency of the evidence upon which orders of the Interstate Commerce Commission are made. There is no occasion for repeating the argument. The presumption is in favor of the order attacked. The evidence shown supports it, and all the evidence is not shown.

3. The appellants say in their brief (p. 18) (emphasizing by heavy type):

> "This is one of the significant things in the New York case and we believe that only in the case at bar did the State authorities

> have full control over passenger fares. In all the other cases from various states, which this Court will have to consider, we understand the fares were fixed by statute. In New York the roads had opportunity to make a case before the local regulatory tribunal with a fair chance for relief."

To justify this statement, the brief quotes (pp. 19 and 20) the provisions of Chapter 134, Laws of New York, 1921, amending Section 49 of the Public Service Commission Law:

> "Notwithstanding that a higher *or lower* rate, fare or charge has been heretofore *prescribed* by *general* or *special* statute, *contract, grant, franchise, condition, consent or other agreement,* and shall fix the same by order to be served upon all common carriers, railroad corporations or street railroad corporations by whom such rates, fares and charges are thereafter to be observed. *Any such change in rate, fare or charge shall be upon such terms, conditions or safeguards as the Commission may prescribe.*"

The words in italics constitute the amendment to Section 49 of the Public Service Commission Law by said Act of 1921 (approved March 30, 1921), and were not in the Law theretofore.

Section 49 as it stood when the application was made to the New York Public Service Commission for increases in intrastate rates to correspond with the advances in interstate rates authorized in *Ex Parte* 74 is quoted in the Commission's report denying that application (Record p. 32). It permitted only the *lowering* of the statutory rate and not an increase thereof. This was

also the state of the law when this suit was brought and when the Court below dismissed the bill. It was not until three months later that the law was changed so as to authorize the Public Service Commission to increase passenger rates beyond the statutory limit of three cents per mile.

This lack of statutory authority was assigned by the New York Commission for its refusal to approve an increase to 3.6 cents per mile. They say in their report:

> "We should not in the absence of legislative authority arrogate to the Commission power to authorize a rate in excess of the statutory maximum merely to enforce a recent act of Congress which contains within itself a special remedy." (Record, p. 35.)

It therefore appears that whatever power may have been given in subsequent enactments, the state of the law in New York when this case was decided was not different from that in the other States referred to in the appellants' brief, where the fares were fixed by statute.

4. The appellants' brief (p. 35) criticizes the formula by which the intrastate rates were increased and contends that, under this formula, the Interstate Commerce Commission may advance intrastate rates but may not lower them to the level of interstate rates. This suggests a question that is purely academic, but if such a condition should exist undoubtedly the State Commissions could remedy it, so long as their acts did not create a violation of Section 13 of the Interstate Commerce Act.

5. The Interstate Commerce Commission is also criticized for adopting the group system. Section 422 of the Transportation Act, however, expressly commands the Commission to adjust

> "such rates so that the carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate)."

Pursuant to this direction the Commission grouped the carriers by territories as heretofore described in this brief (58 I. C. C. 220, p. 225).

6. A new rule in rate making was established by Section 422 of the Transportation Act, namely, on the basis of a fixed return as against the old rule of the cost of service or to equalize, for competitive purposes, different geographical locations. The increases authorized in *Ex Parte* 74 were in accordance with this new rule.

There is, therefore, in this case a different element to be considered in determining the validity of the order of the Interstate Commerce Commission now in question from that involved in the case of *Smyth* v. *Ames* (169 U. S. 466), cited and quoted from in the appellants' brief (p. 50). But aside from that, it may fairly be said that the express purpose of Section 416 of the Transportation Act, and the Commission's order was to remedy just such inequalities in rate levels as this Court in *Smyth* v. *Ames* condemned, where it said (page 541):

> "So far as rates of transportation are concerned, domestic business should not be made to bear the losses on interstate business *nor*

the latter the losses on domestic business." (Italics ours.)

7. The appellants in their brief lay the greatest stress upon their contention that the order under attack is void because it impairs the obligation of a contract, or a group of contracts, between the State of New York and the New York Central Railroad Company, limiting the rate of passenger fare on the railroad of that Company between Buffalo and Albany to two cents per mile.

This argument applies only to rates on the New York Central, and then only to that part of that line between Buffalo and Albany. It does not, in the remotest degree, apply to any of these intervening defendants or to any other railroad mentioned in the order in question. But it is claimed that, if the order is invalid as to the New York Central rates between Buffalo and Albany, it is invalid as a whole. Hence these intervening defendants feel called upon to answer this part of the argument, even though it does not apply to them directly.

A "charter contract," so-called, is claimed to arise from certain statutes of the State of New York and certain other documents of a more or less public nature. The matter is extended and it is not our purpose to go into it at length, for we think it can be disposed of by the application of fundamental principles.

The argument of the appellants assumes that limitations with respect to fares imposed by a State and agreed to by a railroad company constitute contracts valid even as against the constitutional power of Congress to regulate interstate commerce. And peculiar sanctity is claimed

for this contract because it is said to be connected with the State's ancient institution, the Erie Canal. Our contention, however, is that, accepting it that such undertakings amount to contracts yet that with respect to the validity of such a contract as against the power of Congress to regulate commerce, it makes no difference whether it is between two persons or between a State and a person.

No charter contract between the State of New York and the New York Central Railroad Company can override an act of Congress under the commerce clause of the Constitution. It is presumed that all of the acts of the New York legislature and all contracts between the State of New York and the New York Central Railroad Company and its predecessors, were enacted subject to the provisions of the Constitution of the United States and the laws of Congress enacted thereunder.

Louisville and Nashville R. R. Co. v. *Mottley*, 219 U. S. 467;
Addyston Pipe and Steel Co. v. *United States*, 175 U. S. 211;
Knox v. *Lee* (Legal Tender Case), 12 Wall. 457.

8. The appellants' brief (p. 110) criticizes that part of the report of the Interstate Commerce Commission which recites that after the New York commission had denied the application of the carriers for an increase in their intrastate rates, they filed a petition with the Interstate Commerce Commission under Section 13 of the Interstate Commerce Act, and in the heading

under this point, it is said: "The Interstate Commerce Commission has unauthorizedly assumed the authority of an appellate tribunal to review the action of State legislative and regulatory bodies." This criticism is not well founded. The action of the Interstate Commerce Commission was taken in strict accordance with the provisions of Section 416 of the Transportation Act.

9. The contention in the appellants' brief (pp. 116-138), that Congress did not enlarge the powers of the Interstate Commerce Commission over intrastate rates by the Transportation Act is untenable. That this is so is manifest when Section 416 of the Act is considered in connection with Section 422. The words, "undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate and foreign commerce on the other hand [and particularly] or any undue, unreasonable or unjust discrimination against interstate or foreign commerce" took on an added significance when it became necessary, under Section 422, for the Interstate Commerce Commission to prescribe rates that would yield a stated return upon the value of the carriers' properties. Obviously, under this requirement, discriminations would take place in different forms and under different conditions. It was no longer merely a matter of discriminations between persons and places. Interstate commerce itself might be discriminated against; might be required to furnish more than its just share of the fair return.

What the new law forbids and empowers the Commission to remove is—

> "any undue or unreasonable advantage, preference or prejudice *as between* persons or localities *in interstate commerce on the one hand and interstate or foreign commerce on the* other hand, *or any undue, unreasonable or unjust discrimination against interstate or foreign commerce.*" (Italics ours.)

As already pointed out, the clause forbidding discrimination *against interstate or foreign commerce* brings in a new and broader subject, and Section 416 expressly empowers the Commission to remove any such discrimination caused by "any rate, fare, charge, classification, regulation, or practice made or imposed by authority of any State" and to prescribe rates which will remove discriminations "*the law of any State or the decision or order of any State authority to the contrary notwithstanding.*"

It was undoubtedly because Congress fully realized that these provisions might bring federal regulation into conflict with State laws, that it felt the necessity of using the above words to emphasize the supremacy of the national law.

10. The appellants further contend that there is significance in the fact that Section 416 of the Transportation Act does not expressly condemn any "undue burden on interstate commerce." (Brief, pp. 132-135.) The fact appears to be that in the House bill before Congress at the time the transportation measures were pending, the proposed addition to Section 13 of the Interstate Commerce Act prohibited any "undue burden on

interstate commerce" as well as discriminations between persons and places. The appellants offer lengthy extracts from the debates in Congress to show that less interference with the powers of the States was intended by the enactment by Congress of the language of the Senate bill in this regard. But the truth is, as shown by the records of Congress, that the House and Senate bills differed in many respects and that the Conference Committee in some cases adopted the language of the House bill, in others that of the Senate bill, and in still others, neither. The House bill employed the language just stated. The Senate bill condemned any "unjust discrimination against interstate or foreign commerce," but made no direct reference to burdens on such commerce. The Conference Committee adopted the phraseology of the Senate bill. It seems hardly necessary to refer to the rule that resort cannot be had to the debates in Congress where language is free from ambiguity. Aside from this it is clear that this was not a case where the Conference Committee struck out the prohibition against undue burdens and substituted the prohibition against unjust discriminations for the purpose of restricting the functions of the Interstate Commerce Commission in dealing with intrastate rates. On the contrary the language adopted is broader in its grant of power than that of the House bill. "Discrimination" is certainly as comprehensive a word as "burden."

11. Another contention in the appellant's brief may be noticed (pp. 143-153). It is not necessary to secure a constitutional amendment to enable Congress to enter and exclusively occupy a field

previously occupied only by State legislation. This is established by the decisions of this Court relative to the federal control of Safety Appliances, Hours of Service, Employers' Liability, Locomotive Boiler Inspection and other subjects already referred to.

The powers of Congress, under the Constitution, are continuing powers, dormant, perhaps, for a time, but always potent and dominant when brought into exercise by legislative enactment. The Transportation Act is merely an additional chapter in the exercise of those powers.

12. Attention is called in the appellants' brief (p. 117) to sub-paragraph (a) of paragraph (2) of Section 1 of the Interstate Commerce Act as amended, which reads:

> "The provisions of this act * * * shall not apply—
>
> (a) to the transportation of passengers or property * * * wholly within one state and not shipped to or from a foreign country from or to any place in the United States as aforesaid."

The provision in question is a mere general statement of scope and was in the law when the Minnesota and Shreveport cases were decided. It does not purport to, and does not have the effect of, tying the hands of Congress in dealing with intrastate commerce when necessary for the efficient regulation and protection of interstate commerce.

Conclusion.

The decree of the District Court should be affirmed.

Respectfully submitted,

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New York, October 10, 1921.

APPENDIX.

Summary of the evidence before the Interstate Commerce Commission showing discriminations.

The following is a summary of the evidence before the Interstate Commerce Commission in the New York Case (Docket No. 11623) referred to in the Argument:

Bearing upon the discriminations against the body of interstate commerce resulting from the lower State rates, statements were introduced to show the amount of revenue which would be lost to the railroads under such rates. The total passenger revenues for the year 1919 of all of the New York steam railroads reporting to the Public Service Commission was shown to be about $315,000,000. The total intrastate passenger revenue of the principal lines for the same year, including excess baggage and milk and cream, was $55,605,322. Assuming the amount of business in the future to be the same, the difference between what these roads earned for that year and the amount which they would earn were the 20% increase granted by the Interstate Commerce Commission applied to these intrastate fares, is $11,121,066. In addition to that, the surcharge allowed by the Interstate Commerce Commission to be charged passengers occupying space in Pullman cars, but not allowed by the State of New York, and based on figures of the Pullman Company on earnings intrastate within the State of New York, the difference between what was paid by intrastate passengers, occupying Pullman space, for the year ended June 30th, 1920, and

what would have been paid were the 50% surcharge allowed by the Interstate Commerce Commission, permitted to be charged within the State of New York, is about $800,000 a year. The total amount of loss under the State rates without the increases therefore would be approximately $12,000,000 per year. (Record, pp. 76-79.)

Concerning discriminations as between persons and places, the traffic expert of the Trunk Line Association testified with respect to each of the classes of rates involved. It was shown (page 87) that the New York-Buffalo passenger fare is the key to the rate fabric of the entire country or at least of the entire eastern region; that there are several interstate lines between New York and Buffalo, while on the New York Central the same journey is intrastate; that the passenger using the New York Central route at 3 cents per mile would have a decided advantage over the passenger using one of the interstate routes at 3.6 cents per mile, with the result of driving the traffic from the interstate route.

The most important roads running through and into and in the State of New York and out of the State are the New York Central, the Delaware and Hudson, the Delaware, Lackawanna & Western, the Buffalo, Rochester and Pittsburgh, the Erie, the Lehigh Valley, the New York, Ontario and Western, the New York, New Haven and Hartford, and the Pennsylvania. These roads do a very large intrastate business within the State as well as an interstate business (pp. 214, 76-77).

Between New York and Buffalo the main railroads are the lines of the New York Central, the Delaware, Lackawanna and Western, the Erie, the

Lehigh Valley and the West Shore. Of these roads the line of the New York Central between these points is entirely within the State of New York, and the lines of the other roads run through other states (p. 88). The line of the West Shore railroad is controlled by the New York Central and practically parallels the latter for the entire distance. The rate of fare between these points by the lines running interstate is $14.27, but at the state rate via the New York Central it would be $13.16 (p. 90). It was testified that at the time of the hearing the interstate railroads were charging the interstate rate and the New York Central was charging the intrastate rate with the result that there had been considerable falling off in the traffic handled by the lines other than the New York Central (p. 93).

This was due not only to the difference in the passenger fare of .6 of a cent per mile in favor of the intrastate line, but on account of the surcharge on Pullman tickets, which was not allowed to be charged intrastate and which was charged interstate. The traveler between New York and Buffalo, upon the intrastate line under the state rate would pay for his ticket, his Pullman berth and war tax $16.91, but traveling by one of the interstate lines between the same points he would pay for his passage ticket, his Pullman berth, his surcharge upon the Pullman and war tax $19.46, a difference of $2.55 in favor of the intrastate trip.

The inevitable result of this is that if the situation should continue there would either be no traffic upon the interstate railroads between those points or the interstate lines must reduce their fares to the intrastate level (p. 134). The situa-

tion applies to every common point in the State of New York and to practically the entire state (p. 94). The situation would be considerably aggravated if mileage books were sold at the rate of two cents per mile as is required by the State law (p. 91).

Between New York City and Chicago are the lines of eight railroads, the short line being that of the Pennsylvania. Under General Order No. 28 of the Director General passenger fares were fixed at three cents per mile and the rate of the Pennsylvania Railroad between New York and Chicago was consequently fixed at its mileage, multiplied by three cents, or 908 miles at three cents, or $27.24 (p. 112). This of course governed the rate for the other lines between those points and since August 26, 1920, when the advances in passenger fares authorized by the Interstate Commerce Commission went into effect the rate continued to be made over the Pittsburgh route, being $32.67 (p. 112). If, however, the New York State rates should be permitted to stand, the interstate rate, New York to Chicago, must be made upon the basis of the New York to Buffalo intrastate rate, plus the Buffalo to Chicago interstate rate, viz: $13.16 plus $18.81, or $31.97.

Between New York and Syracuse railroad service is given by three railroads, the New York Central, an intrastate line, and the West Shore and the Delaware, Lackawanna and Western, interstate lines. Between New York and Rochester are four lines: one, the New York Central, intrastate; the others, the West Shore, the Erie and the Lehigh Valley, interstate. The same situation exists at Ogdensburg and various other important

points in the State of New York, such as Utica, Jamestown, Geneva and Dunkirk; that is, they are served by both intrastate and interstate lines. Between all of these points upon the interstate roads the present increased interstate fares are being charged and if the intrastate fares were lower there would be the same result as shown upon the traffic between New York and Buffalo under the state fares (p. 104).

All interstate business between New York and points west of Buffalo is affected by the intrastate passenger fare between New York and Buffalo, as it is easy for a passenger to Chicago, or points intermediate between Chicago and Buffalo, to ride intrastate between New York and Buffalo and then to buy another ticket interstate to his destination. The amount thus saved under the state rate, New York to Buffalo, would be $2.55. As a matter of fact this was common practice while the state rate was in effect. The same opportunity occurs and the same practice existed as to all points outside of the State of New York to or from which passengers came or went without or within the State. The following are a few particular instances: on the fare from Albany to Chicago, exclusive of the surcharge for Pullman space, the through fare from Albany to Chicago is $29.48; intrastate fare from Albany to Buffalo is $8.89; Buffalo to Chicago $18.81; the total of the combination being $27.70 (p. 97). From Buffalo to Boston the through rate is $17.90; the combination of the intrastate rate from Buffalo to Albany and the interstate rate from Albany to Boston is $16.12. This difference in fare applies, of course, to all points intermediate between Boston and the

Massachusetts state line. For instance, a passenger from Buffalo to Pittsfield, if he bought a through interstate ticket, would pay $12.47. At the intrastate fare, by buying a ticket to Albany from Buffalo, $8.89 and then a ticket from Albany to Pittsfield, $1.80, the total fare paid would be $10.69 (p. 97).

The interstate rate from Philadelphia to Albany is $8.37; the combination of the interstate rate to New York and the intrastate rate from New York to Albany would be $7.51 (p. 97). Upon the line of the Ontario and Western the interstate fare from New York to Oswego is $11.75; the combination of the interstate rate from New York to Cornwall and the intrastate from Cornwall to Oswego would be $10.11 (p. 198). So long as the state rate was in force it was common practice, as all trains stopped at Cornwall, for passengers upon that line from New York to and from Oswego and other points within the state to pay the intrastate fare between Cornwall and the intrastate point and the interstate fare between Cornwall and New York City (p. 98).

The prevailing fare intrastate in all the territory contiguous to New York State—all of New England, Pennsylvania, New Jersey, Delaware, Maryland and Virginia—was found to be 3.6 cents per mile, that is, the same as the interstate fares (p. 125).

The traffic witness testified to the advantage to be gained by the interstate traveler who would buy a ticket between points within the state at the lower rate and then continue his journey out of the state by purchasing an interstate ticket for the remainder of his trip, over the passenger pay-

ing the regular interstate rate between the same points and traveling on the same train. Developing that point the testimony was (page 87):

"Q. (By Mr. Paulding) Your experience, of course, has made you familiar with the effect of the geographical situation the State of New York has on the passenger rate structure in the east? A. Yes, sir.

"Q. What is that effect? A. Well, the effect is that New York and Buffalo, being such important commercial centers that they practically are a fundamental key, you might say, to the entire rate fabric of this country. You cannot disturb the rate between New York and Buffalo or Albany and Buffalo, for instance, in this particular instance and make it three cents a mile against 3.6 cents a mile, without very seriously affecting the entire rate fabric of the country.

"Q. Will you enlarge that a little bit and show how and in what way, as a practical matter, that statement of yours works out? A. Passengers can take advantage of the lower intrastate fares of the New York Central from New York and other points to Buffalo, to secure through transportation at less than the interstate fares on combinations, by buying tickets to Buffalo and repurchasing therefrom, as illustrated by the following examples:

"Through fare New York to Cleveland, which is interstate, $20.52. Combination New York to Buffalo, intrastate, $13.16, Buffalo to Cleveland, interstate, $6.56; total $19.72, or on repurchase a saving of 80 cents on every ticket.

Asked whether such conditions applied generally throughout the state the witness testified

(page 94) that they did. The appellants argue (page 41 of their brief) that it is impracticable for passengers to defeat the interstate rate by breaking their interstate journey, claiming that few trains stop long enough at stations to enable passengers to alight and purchase new tickets at the points which they would thus select. Such argument, however, overlooks the fact that as passenger fares are now upon a mileage basis the interstate rates can be as well defeated by payment of fare upon the trains as by purchasing new tickets.

The testimony regarding the surcharges for parlor and sleeping car space was similar in effect to that regarding passenger fares.

> (Record, p. 87): "Q. And as to the surcharge on Pullman, is there a difference as to that? A. With respect to the surcharge on Pullman, not being collected in the State of New York, it means a passenger riding from New York to Buffalo in a sleeping car is enabled to save $1.25, which is the rate on which the surcharge is based, while other lines direct between New York and Buffalo, being intrastate, passengers would not be enabled to get through at less than paying the $1.25 surcharge.
>
> "Q. (By Exam. LaRoe) Does that mean on the through passenger traffic from New York to Cleveland, the interstate fare would be defeated to the extent of $2.05 for a passenger traveling in a sleeping car? A. Yes."

(Record, page 102):

> "Q. Now, as to the surcharge upon Pullman space, will you state what the effect of that is as to passengers in the State of New

York and passengers interstate? A. The Interstate Commerce Commission authorized a surcharge for space occupied by passengers traveling in parlor and sleeping cars on the basis of 50 per cent of the Pullman rate, but the Public Service Commission did not approve it and hence taking the New York-Buffalo situation for illustrative purposes, a passenger occupying a lower berth in a sleeping car over the New York Central Railroad, does not pay the surcharge of $1.25, while such surcharge collection is made from passengers traveling over the other lines between the same points, and which has the effect of further widening the disparity between the cost of the trip where a sleeping car is used by the other lines operating between the same points. There are through passengers destined to or from points west of Buffalo as, for example, Chicago, who only purchase their sleeping car accommodations as far as Buffalo, on account of the surcharge not being made there. The New York Central Railroad in New York State, it extends no equal conditions under which passengers may journey that way at less cost than passengers traveling in sleeping cars over the other lines operating between New York and Chicago."

The Pullman charge for a lower berth between New York and Chicago is $6.00, the surcharge therefor being $3.00, making a total charge of $9.00. Should the surcharge not be permitted between New York and Buffalo, this of course would further reduce the rate between New York and Chicago to the advantage of those persons breaking their journey at Buffalo, or buying tickets, as

can be done and is done, from New York to Buffalo, obtaining a berth between those points, and then continuing on the same train by paying the interstate fare from Buffalo west.

The service over the New York Central Railroad between New York and Buffalo and other intrastate points is the same as the service between New York and Chicago, Cleveland, and other interstate points (p. 131), and persons going from New York to Cleveland, for instance, travel upon the same trains as persons going from New York to Buffalo (p. 132). There is no difference in transportation conditions within the State of New York and those without the State of New York which justifies a lower level of rates within the State of New York (p. 141). There are no transportation conditions, meaning geographic conditions, traffic conditions, and everything bearing on cost of the service, within the State of New York more favorable than for the various interstate hauls into and out of the State of New York via the lines of the different interstate railroads (p. 142).

With respect to this important matter of the similarity of the transportation service rendered to intrastate and interstate passengers the Traffic Manager of the New York Central testified as follows (page 131):

> "Q. Is or is not the service rendered by the different roads between the different common points or between New York and points in the State of New York, a similar service or is it otherwise? A. Quite similar.
>
> "Q. Will you say in what respect it is similar? A. As to approximate running time, character of equipment, dining car service.

"Q. And as to number of trains? A. Yes; there is, speaking directly of the service, between New York and Buffalo, there are more trains via the New York Central than via the other lines. A very large percentage of the business, however, is done on night trains, and the service both as to the character of equipment and running time is approximately the same."

With respect to milk and cream rates: The City of New York is of course the largest consumer of milk and cream in the State. Practically the entire amount of these commodities consumed in that city is brought from producing points within the State of New York or within the States of Vermont and Connecticut. Prior to August 26, 1920, the rates upon these commodities were those fixed by the Interstate Commerce Commission in case 8558, reported in 45 I. C. C. 413, as increased by the Director General in 1918, and the interstate and intrastate rates were the same (p. 149). About 40% of the milk and cream brought into New York is over the line of the New York Central and of that 40%, 75% is intrastate (p. 149). Over the same line, namely, its Harlem Division, that road transports every day trains containing intrastate milk on the one hand and trains containing interstate milk on the other, the intrastate milk being milk collected within the state, and the interstate milk being collected within the States of New York and Vermont by the Rutland Railroad Company and The Delaware and Hudson Company and delivered to the New York Central for transportation to New York City (pp. 150-154). The New York Central also brings milk

over its own line from territory in northern New York, from which territory comes the milk transported interstate over the line of the Rutland Railroad and milk of the same localities is thus transported to New York City over two lines, one intrastate and one interstate (p. 150). The result of a lower intrastate rate would, of course, be that interstate traffic would be substantially prejudiced if not destroyed.

For example, milk is transported over the line of the Delaware and Hudson enroute to New York City and is collected at points within the State of New York and within the State of Vermont, as the line of that Company crosses the state line at various points. The milk collected in Vermont pays the interstate rate, but under the lower state rate part of the milk collected in New York would pay the interstate rate, being collected in that state and transported through Vermont back into New York State, and the rest of the milk collected in New York would pay the intrastate rate, although the commodity is transported upon the same trains and the communities from which the milk is collected are but a few miles apart. All of this milk reaches New York City ultimately over the lines of the New York Central (pp. 151, 161-163).

The greater part of the other 60% of the milk delivered to New York City is collected within the State but transported over the lines of interstate railroads and is delivered at Jersey City, Hoboken and Weehawken and transported to New York City by ferry (p. 155). All this milk takes the higher rate although many of the communities from which it is collected are in the State of New York and have communication with New

York City by an intrastate road, or its connections intrastate (p. 160). The result, of course, would be that if the interstate rates were maintained and the lower intrastate rates permitted to remain, the interstate traffic would disappear or move on a substantially higher basis of rates.

The railroads interested in this traffic delivering to the Jersey side of the river are the Delaware, Lackawanna and Western, the Lehigh Valley, the New York, Ontario and Western, the Erie, the West Shore and the Pennsylvania. Five of these railroads deliver either at Hoboken or Jersey City, the West Shore being the only railroad delivering at Weehawken, and that road delivering milk originating on the line of the Ulster and Delaware, a road situated entirely within the State of New York (pp. 154-155).

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Supreme Court of the United States

OCTOBER TERM, 1921.

No. 283.

THE STATE OF NEW YORK AND CHARLES D. NEWTON, PERSONALLY AND AS ATTORNEY GENERAL OF THE STATE OF NEW YORK, Appellants,

vs.

THE UNITED STATES AND EDGAR E. CLARK, ET AL., Appellees.

Appeal from the District Court of the United States for the Northern District of New York.

SUPPLEMENTAL BRIEF FOR INTERVENING DEFENDANTS.

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Appeal from the District Court of the United States for the Northern District of New York.

SUPPLEMENTAL BRIEF FOR INTERVENING DEFENDANTS.

Supplemental Statement as to the Power of Congress to Enact the Transportation Act, 1920, and as to the Legal Interpretation of Paragraphs 3 and 4 of Section 416 of that Act (Section 13 of the Interstate Commerce Act).

FIRST.

THE CONSTITUTIONAL POWER OF CONGRESS.

The Constitutional power of Congress to enact this legislation will be considered under three separate clauses of the Cnstitution, namely:

1. The Commerce Power.
2. The War Power.
3. The Power to Establish Post Offices and Post Roads.

I.

THE COMMERCE POWER.

The Commerce Power, standing alone, is adequate to support the regulation by Congress, contained in paragraphs (3) *and* (4) *of Section* 13 *of the Interstate Commerce Act, of the State rates of carriers engaged in interstate commerce.*

The principles relating to the power of Congress under the commerce clause of the Constitution, have been so often considered by this Court, and are so familiar and so well established, that it would hardly seem appropriate to enter upon any extended discussion of the question, were it not for the fact that the power as related to this case is assailed.

When the history of the adoption of this clause of the Constitution is recalled, and the causes leading to it are remembered, it is difficult to understand how it can be objected to by any State.

In view, however, of the attitude of the State of New York, as expressed in this record, it is of peculiar interest at this time, in considering the causes which brought the Federal Constitution into existence, to study the influence which the desire of

the States for a uniform regulation of commerce had upon its adoption and upon its character.

When the War of the Revolution ended and Independence was an accomplished fact, each State possessed a sovereignty which was practically unlimited over its foreign commerce, and its commerce with other States.

> "Congress had no power to regulate commerce, but each State, left to itself, ordered its own trade in its own way; and the way of one State was always different from the way of another. The commerce which Massachusetts found it to her interest to encourage, Virginia found it to hers to restrict. New York would not protect the trade in indigo and pitch. South Carolina cared nothing for the success of the fur interests. New England derived great revenues from lumber, oil and potatoes; Pennsylvania from corn and grain, and were in no wise concerned as to the prosperity of the trade of their neighbors. Articles which Connecticut and New Jersey excluded from their ports by heavy tonnage duties, entered New York with scarcely any charges other than light money."
>
> McMaster's History of the American People, Vol. I, p. 206.

Between many of the States, thus divided in interest and policy, there was a race of greed and selfishness for commercial advantage and supremacy.

Each State possessed the power of imposing export taxes, and could thus keep its products at

home, excluding them from the use and enjoyment of the people of the other States; and of imposing import duties, and could thus exclude the people of other States from its markets. Each State retained complete control over its own ports; and thus, by its commercial policy, could, through the competition of ports, regulate or break down the commercial policy of another State in regard to its own ports and in regard to its own commerce.

These powers were large enough, not only to create State rivalries and State enmities, but to elevate the States of greatest commercial power into complete commercial, and finally into complete political, ascendency over their weaker sister States.

Nor were these powers merely theoretical. They were brought into active and oppressive operation. They were made the means of commercial war by one State upon another.

For example:

Virginia, by her export duties and inspection laws, with the incidental tax, sought to keep her tobacco at home.

Maryland, by her inspection laws and taxes, sought to do the same with regard to her potash and pearl-ash.

Massachusetts prohibited the exportation of grain and of unmanufactured calfskins, and imposed an onerous inspection tax on exports to other States of tobacco, butter and other products; while North Carolina for a limited time laid an

embargo on the exportation to other States of corn, wheat, flour, beef, bacon and other necessaries of life.

Turning to imports:

New York, by imposing an import duty, sought to exclude from its markets the butter, milk, and other dairy products of New Jersey and the firewood of Connecticut.

Rhode Island imposed an ad valorem tax of five per cent on all articles imported into that State from the other States as well as from foreign countries, with a proviso for reciprocal relief.

And so with other States.

In regard to the commercial rivalry and war of ports, it was customary for States having available ports to impose an unlimited tax on all goods reaching this continent through their ports, and thus subjecting, for the benefit of themselves, the people of the other States to a substantial burden of taxation.

For example, the ports of Boston and New York were at one time far behind Newport in the value of their imports, and Rhode Island, according to the Supreme Court of the United States, paid all the expenses of her government by duties on goods landed at her principal ports.

The condition at that time of commercial selfishness and greed between the States is thus described by Fiske in his work on the "Critical Period of American History, 1783-1789," at page 144:

> "Meanwhile, the different States, with their different tariff and tonnage acts, be-

gan to make commercial war upon one another. No sooner had the other three New England States virtually closed their ports to British shipping, than Connecticut threw hers wide open, an act which she followed by laying duties upon imports from Massachusetts.

"Pennsylvania discriminated against Delaware; and New Jersey, pillaged at once by both her greater neighbors, was compared to a cask tapped at both ends. The conduct of New York became especially selfish and blameworthy. That rapid growth which was soon to carry the city and State to a position of primacy in the Union had already begun. After the departure of the British the revival of business went on with leaps and bounds. The feeling of local patriotism waxed strong, and in no one was it more completely manifested than in George Clinton, the Revolutionary general, whom the people elected Governor for nine successive terms. * * * * It was his first article of faith that New York must be the greatest State in the Union. But his conception of statesmanship was extremely narrow. In his mind, the welfare of New York meant the pulling down and thrusting aside of all her neighbors and rivals. * * * * Under his guidance, the history of New York, during the five years following the peace of 1783, was a shameful story of greedy monopoly and sectional hate. Of all the thirteen States none behaved worse except Rhode Island.

"A single instance, which occurred early in 1787, may serve as an illustration. The

City of New York, with its population of thirty thousand souls, had long been supplied with firewood from Connecticut, and with butter and cheese, chickens and garden vegetables, from the thrifty farms of New Jersey. This trade, it was observed, carried thousands of dollars out of the city and into the pockets of detested Yankees and despised Jerseymen. It was ruinous to domestic industry, said the men of New York. It must be stopped by those effective remedies of the Sangrado school of economic doctors, a navigation act and a protective tariff.

"Acts were accordingly passed obliging every Yankee sloop which came down through Hell Gate, and every Jersey market boat which was rowed across from Paulus Hook to Cortlandt street, to pay entrance fees and obtain clearances at the custom-house, just as was done by ships from London or Hamburg; and not a cartload of Connecticut firewood could be delivered at the back door of a country house in Beeckman street until it should have paid a heavy duty. Great and just was the wrath of the farmers and lumbermen. The New Jersey legislature made up its mind to retaliate. * * * Connecticut was equally prompt. At a great meeting of business men, held at New London, it was unanimously agreed to suspend all commercial intercourse with New York. Every merchant signed an agreement, under penalty of two hundred and fifty dollars for the first offense, not to send any goods whatever into the hated State for a period of twelve

months. By such retaliatory measures, it was hoped that New York might be compelled to rescind her odious enactment. But such meetings and such resolves bore an ominous likeness to the meetings and resolves which in the years before 1775 had heralded a state of war; and but for the good work done by the Federal Convention another five years would scarcely have elapsed before shots would have been fired and seeds of perennial hatred sown on the shores that looked toward Manhattan Island."

But these discriminations and exactions of one State against the trade of another, and the rivalry in trade which threatened the commercial destruction of some States and the undue elevation, prosperity and dominance of others, were not the only reasons for the insistent demands which preceded and finally controlled the Constitutional Convention of 1787 in regard to the establishment of a system of just and equitable regulation of commerce between the States by an authority fairly representing them all.

The question of commercial regulation, in addition to its relationship to the trade between the existing States, possessed also a most important and commanding political aspect. The development of the West was then progressing with great rapidity, and that region was spoken of by George Washington as a "rising world," signifying particularly, in the minds of the statesmen of that day, the territory now constituting the States of

Tennessee and Kentucky, and the States afterwards carved out of the territory northwest of the Ohio and east of the Mississippi rivers. The future political affiliation of this large and important territory was a question of prime and of vast importance to the then existing States. Great Britain was on the northern boundary with its Dominion of Canada, and Spain on the south commanded the mouth, and hence commanded the navigation, of the Mississippi River. The course of trade is determined by the inducements that are offered and the facilities it can command, and political relationships are strongly influenced by commercial ties and interests. It was, therefore, one of the most important problems of that day to bind this great and developing western country to the eastern States by ties of intimate commercial intercourse. This could not be done if the eastern States could enrich themselves by imposts upon the commerce paid for by the people of the West, or by excluding the competitive products of the West from the eastern markets.

Great Britain or Spain, close neighbors on the north and south, could easily outbid such a policy of narrowness and selfishness as the people of the West saw already in operation in many of the most important eastern States, and it was apparent that whether or not such a policy should be adopted, could not be safely left to the individual States.

George Washington, in speaking of the future political affiliations of these pioneer western people, said:

"If we cannot bind these people to us by interest, and it is not otherwise to be effected but by a commercial knot, we shall be no more to them after a while than Great Britain or Spain, and they may be as closely linked with one of those powers as we wish them to be with us, and, in that event, they may be a severe thorn in our side."

It thus became necessary, not only as a matter of sound economics but also as a matter of wise and broad politics, to find a way of fairly regulating commerce in the interest of all, free from the narrowness and selfishness of the individual States.

The only way of remedying these commercial evils, which were flagrant and were universally recognized, and of meeting the political exigencies of the situation, was, according to the practically universal belief of the day, to exclude the States from the power to regulate commerce among the States and with foreign nations, and to confer that power without reservation upon a central authority which should fairly and equitably represent them all.

The public consciousness on this subject was, prior to the Constitutional Convention, indicated in a great variety of ways and from a great variety of sources.

Alexander Hamilton declared for a central government with "complete sovereignty over all that relates to war, peace, trade and finance."

James Monroe, as Chairman of a Committee of

the Congress under the Federation, in 1785, submitted a report declaring that:

> "The United States in Congress assembled shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article, * * * * and of regulating the trade of the States, as well with foreign nations as with each other."

James Madison moved in the General Assembly of Virginia a resolution for a convention of delegates of all the States "to take into consideration the trade of the United States; to examine the relative situation and trade of the said States; to consider how far a uniform system in their commercial regulations be necessary to their common interest and permanent harmony."

There were similar expressions of view in the legislatures of Rhode Island, Connecticut and New Jersey, in the resolutions of town meetings, and in reports of committees of Congress under the Federation.

The Madison resolution resulted in the assembling of the Annapolis Convention in 1786 and in a recommendation by the delegates, there assembled *to consider the regulation of commerce,* that Congress should call a general convention of all the States to meet in Philadelphia on the second Monday in May, 1787, "to devise such further provisions as shall appear to be necessary to render

the Constitution of the Federal Government adequate to the exigencies of the Union."

The Convention thus called was the Convention which framed the Constitution, and the declaration of the Supreme Court of the United States in the case of *Cook vs. Pennsylvania,* 97 U. S., 566, is amply justified, to the effect that:

> "A careful reader of the history of the times which immediately preceded the assembling of the convention which framed the American Constitution cannot fail to discover that the need of some equitable and just regulation of commerce was among the most influential causes which led to its meeting."

The result of its deliberations on the four large subjects of national concern enumerated by Alexander Hamilton—which are the four fundamental essentials of national existence and efficiency—and as to which he declared that the Federal Government should possess complete sovereignty, namely, the purse, war, peace, and commerce, is exhibited in the following clauses of the Constitution:

> "The Congress shall have power:
>
> "To lay and collect taxes, duties, imposts and excises, to pay debts and provide for the common defense and general welfare.
>
> * * *
>
> "To borrow money on the credit of the United States.
>
> "To regulate commerce with foreign na-

tions and among the several States, and with the Indian tribes.

"To declare war. * * * *

"To raise and support armies.

"To provide and maintain a navy."

By entering into the compact of the Constitution, each State *acquired the right* to have these essential functions and duties performed by the Federal Government established by the Constitution as representing all the States. In entering into the compact the State *reserved* some rights which it did not grant, and it also acquired some rights which it did not have. The rights acquired are not less State rights and are not less important or less sacred than those reserved.

The acquired rights of the States included the right to avail themselves, separately and individually, of the protection guaranteed to them and their people against foreign or domestic invasion.

The States acquired the right that the Federal Government should bear the expense of raising and supporting armies, and of providing and maintaining navies.

They acquired the right to be protected against the narrowness and greed of sister States in the matter of duties, imposts and excises, and to have established a national monetary system.

They each likewise acquired the right, as to the trade in which it and other States were interested, of being protected by an authority representing them all in equality of opportunity and against the oppression and selfishness of other States.

All of these rights have grown in importance as civilization has developed, and as intercourse between the States and between nations has become more rapid, easier and more necessary. As to none of these rights is this truer than in respect of the right of the States to have the commerce in which all are interested regulated by an authority which represents them all.

Since the adoption of the Constitution commerce has assumed far greater consequence in the affairs and destinies of men and of nations, than it had in those earlier days. Steam and electricity have come with their mighty influence, and have brought all the States and all the nations into close and intimate commercial relationship.

Men no longer deal in trade most largely with their immediate neighbors, but find it essential to their success to have free and unimpeded and adequate access to the markets of the world.

The interests of the producing States—particularly the States of the South and the West, where there are no markets of the first importance—imperatively require easy and quick transportation to the world's great market cities, such as New York, Philadelphia, Boston, and Chicago in this country, and Liverpool, London and Paris abroad.

It may be safely stated that at least eighty-five per cent of the trade of the various States moves in interstate and foreign commerce. It traverses vast distances; it must pay low mileage rates to reach and to compete in distant markets; it cannot, because of the value of time and the small

margins of profit, permit frequent handlings or breakings of bulk.

To meet these economic conditions—to satisfy the essential needs and to accommodate the movement of this great traffic—it has become necessary to create long and continuous lines of railroad in the place of the short and disconnected lines which were once adequate to the requirements of trade. These large systems of railroad which have come into being in obedience to the economic law which demands continuous, rapid and unbroken transportation, necessarily extend across many States.

Congress, recognizing this economic development, has provided in the Transportation Act for the consolidation of the carriers into great systems. (Sec. 407, Paragraph 4.)

The problem of greatest magnitude which concerns the people of all the States in regard to these carriers is how their continuity of service shall be preserved unobstructed, and what shall be the quality, adequacy and efficiency which their transportation facilities shall possess.

Each State, being dependent for its prosperity upon the producing capacity of its people, which, in turn, is dependent upon the adequacy of the means of reaching the markets of the world, is deeply concerned that the transportation capacity of the carriers which serve it shall be adequate, and shall not be crippled or impaired.

A broad and wise policy in dealing with the instrumentalities of commerce is, therefore, a matter of supreme interest to all the States. A nar-

row or niggardly or selfish policy, if adopted by any one of the States through which a railroad passes, may seriously cripple and depress the commerce of every other State which the railroad serves.

No adequate conception of the transportation problem, as it affects the development of the country and the growth of its commerce, can ignore the necessity that transportation facilities must be all the time growing and improving to keep pace with the growth and expansion of commerce—otherwise there can be no growth or expansion of commerce.

Such growth in transportation facilities involves a constant input of new capital, and new capital can only be attracted by credit. While no one State through which a railroad passes can alone establish a railroad company's credit, a single State can impair or destroy it.

If a railroad runs through and serves eleven States, ten of them may be guided by broad and liberal views, and may be controlled by the policy of encouraging the establishment and maintenance of adequate transportation facilities, and may not only be willing, but may desire that the transportation charges shall be adequate to establish in the public interest adequate credit for the carrier. The eleventh may, however, have no adequate commercial outlook, and may be unwilling that its State traffic shall contribute anything to the liberal programme of the other ten, which would build for the future and insure the present and

continuing adequacy of the transportation facilities on which all are equally dependent.

In such a case, what shall be done? Shall the ten States bow to the will or caprice of the one and allow it to control? Shall they permit the narrow view of the one State to limit the standard or the character or the quality of the transportation facilities which their people shall enjoy? If so, then the one State controls not only its own commerce, but the commerce of the others, for it limits by its restrictive policy the transportation facilities which make possible the commerce of the other States.

If, on the other hand, the standard of facilities is not brought down to this low level, and is to be made adequate to the needs of all, then, if the objecting State can avail itself, on its own terms (short of confiscation), of the facilities common to them all, then the commerce of the other ten States, or interstate commerce, or both, must bear the burden which the dissenting State has refused to share, of building up and maintaining adequate transportation facilities for them all.

In either case the dissenting State, in a very effective way, regulates the interstate and foreign commerce and business opportunities of all. It either determines the standard of the commercial facilities, and, therefore, the commercial opportunities, of the other States, or it throws on them an unfair and undue proportion of the burden of sustaining them at a level of higher efficiency.

Is it not the right of each of these States, thus

oppressed by the narrow and selfish policy of one —a right acquired under the compact of the Constitution—to have its facilities for interstate and foreign commerce (in case Congress, representing all the States, shall deem it just and wise) freed from these State restrictions and regulated by an authority representing all of them?

No more striking illustration can be imagined of the fundamental differences in policy, between the States, in respect to the standard of transportation facilities, than is furnished by the controversies growing out of the Transportation Act of 1920. We find more than thirty States agreeing with the national policy of maintaining adequate transportation facilities, and readily adjusting the charges upon the State traffic of their respective States to the level fixed by the national authority, while a few other States are objecting to, and declining to participate in sustaining, the policy thus approved by the national Government and by the Government of a large majority of the States themselves.

What is to be done? Shall the views of the national Government and of the States which agree with its policy prevail, or shall the views of the dissenting States become the dominant regulation of commerce?

If the latter, Congress would be denied the exercise of its constitutional authority, and the State, not the nation, would be supreme within the national field.

Houston & Texas Railway v. United States, 234 U. S., 352.

American Express Company v. Caldwell, 244 U. S., 624.
Illinois Central Railroad Company v. Public Utilities Commission, 245 U. S., 506.

The proposition here stated that the national standard as to the adequacy and efficiency of the instrumentalities of interstate commerce cannot be surrendered to the States' judgment without an abdication in favor of the States to regulate interstate commerce, is sustained in principle in the case of *Houston & Texas Railway vs. United States,* 234 U. S., 355, where the Court says:

> "It is also clear that, in removing the injurious discrimination against interstate traffic arising from the relation of intrastate to interstate rates, the Congress is not bound to reduce the latter below what it may deem to be a proper standard, fair to the carrier and to the public. Otherwise it would prevent injury to interstate commerce only by the sacrifice of its judgment as to interstate rates. Congress is entitled to maintain its own standard as to these rates, and to forbid any discriminatory action by interstate carriers which will obstruct the movement of interstate traffic over their lines in accordance with the terms it establishes."

From the case just cited we make the following additional quotation from page 350:

> "It is unnecessary to repeat what has frequently been said by this Court with respect to the complete and paramount

character of the power conferred on Congress to regulate commerce among the several States. It is the essence of this power that where it exists it dominates. Interstate trade was not left to be destroyed or impeded by the rivalries of local government. The purpose was to make impossible the recurrence of the evils which had overwhelmed the Confederation and to provide the necessary basis of national unity by insuring 'uniformity of regulation against conflicting and discriminating State legislation.' By virtue of the comprehensive terms of the grant the authority of Congress is at all times adequate to meet the varing exigencies that arise, and to protect the national interest by securing the freedom of interstate commercial intercourse from local control."

From page 351:

"The fact that the carriers are instrumentalities of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter, or preclude the Federal power from being exerted to prevent the intrastate operations of such carrier from being made a means of injury to that which had been confided to Federal care. Wherever the interstate and intrastate transactions of carriers are so related that the government of one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Con-

gress would be denied the exercise of its constitutional authority, and the State, and not the nation, would be supreme within the national field."

The law of this line of cases is thus summarized by the Court in the case of the *Illinois Central Railroad Company vs. the Public Utilities Commission,* 245 U. S., 506:

"1. Under the commerce clause of the Constitution, Congress has ample power to prevent the common instrumentalities of interstate and intrastate commerce, such as the railroads, from being used in their intrastate operations in such manner as to affect injuriously traffic which is interstate.

"2. Where unjust discrimination against interstate commerce arises out of the relation of intrastate to interstate rates this power may be exerted to remove the discrimination, and this whether the intrastate rates are maintained under a local statute or by the voluntary act of the carrier.

"3. In correcting such discrimination Congress is not restricted to an adjustment or reduction of the interstate rates, but may prescribe a reasonable standard to which they shall conform and require the carrier to adjust the intrastate rates in such way as to remove the discrimination; for where the interstate and intrastate transactions of carriers are so related that the effective regulation of one involves control of the other, it is Congress, and not the State, that is entitled to prescribe the dominant rule.

"4. It is admissible for Congress to pro-

vide for the execution of this power through a subordinate body such as the Interstate Commerce Commission, and this it has done by the Act to Regulate Commerce.

"5. Where in the exercise of its delegated authority the Commission not only finds that a disparity in the two classes of rates is resulting in unjust discrimination against interstate commerce but also determines what are reasonable rates for the interstate traffic, and then directs the removal of the discrimination, the carrier not only is entitled to put in force the interstate rates found reasonable but is free to remove the forbidden discrimination by bringing the intrastate rates to the same level."

In *American Express Co. vs. Caldwell,* 244 U. S., 617, this Court made the following significant comment, at page 625:

> "That Court (the Supreme Court of South Dakota) denies not only the intent of Congress to confer upon the Commission authority to remove an existing discrimination against interstate commerce by directing a change of an intrastate rate prescribed by state authority; but denies also the power of Congress under the Constitution to confer such power upon the Commission or to exercise it directly. The existence of such power and authority should not have been questioned since the decision of this Court in the Shreveport case."

The argument is essentially unsound which con-

cedes to the national government the power to regulate interstate rates, which are merely the terms on which interstate commerce is conducted, and denies to it the power to regulate the standard and efficiency of the instrument of interstate commerce, which constitutes the essential condition of the very existence of interstate commerce itself—for the constitutional power of regulation is "to foster and protect," as well as "to control and restrain."

Houston & Texas Ry. v. United States, 234 U. S., 351.

The argument is likewise essentially unsound which concedes to the national government the power to declare and remove a discrimination of a single rate made by a state against a competitive interstate rate, but denies to it the power to declare and remove a discrimination created by a body of state rates against the entire structure of interstate commerce, for that would amount to the concession of a power to protect a detail of interstate commerce and a denial of the power to protect and preserve interstate commerce itself. Under such an argument the value of the detail would disappear in the destruction or impairment of the whole, of which the detail is only a part.

In fact, as has been plainly stated by this Court,

> "Congress, which alone exercises the legislative power of the Government, is the constitutional protector of foreign and interstate commerce."

Louisville Bridge Company v. United States, 242 U. S., 417;
Bridge Company v. United States, 105 U. S., 480.

This power can not in reason be confined to the regulation only of details, but must extend to and include the whole structure of interstate commerce.

The following propositions, as to the extent of the power of Congress under the commerce clause, are established beyond the reach of successful controversy by the decisions of this Court:

1. The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from state to state, is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce.

California v. Pacific RR. Co., 127 U. S. 39.

2. The lawful power to create the corporation and give it the attributes deemed essential cannot be rendered unavailing by detaching particular powers and thus destroy the efficacy of the corporation as a national instrument. Although a particular character of business might not when considered by itself be within the implied power of Congress, if such business is appropriate and relevant to the business of the corporation, the implied power is to be tested by the right to create the corporation and to attach to it that which is

relevant, in the judgment of Congress, to make the business of the corporation successful.

First National Bank v. Union Trust Co., 244 U. S., 420.

McCulloch v. Maryland, 4 *Wheat,* 316.

Osborn v. Bank, 9 Wheat, 738.

3. The entire instrumentality of interstate commerce is within the regulating power of Congress and when exercised the regulation is controlling and exclusive.

Minnesota Rate Cases, 230 U. S., 399, 411.

Houston & Texas Ry. Co. v. United States, 234 U. S., 351.

> "The power to regulate is one to control the means by which commerce is carried on."
>
> *Hammer v. Dagenhart,* 247 U. S., 269.

Under these principles the Government itself might construct a transportation system, or acquire one already constructed, or might exercise through private individuals or private corporations its power of providing for commerce.

Whether owning and operating the instrumentality itself, or performing the function through private individuals or private corporations, it is competent for the Government to authorize the instrumentality of interstate commerce to engage in state commerce, and, under its power to regulate the instrumentality, to regulate all its

activities and interests, so far as the public interest may require, including, if it so elect, the regulation as an original matter of the state rates of such interstate carriers.

No one would question the power of the Government, if it owned and operated the instrumentality itself, to regulate all the rates of its instrumentality, state as well as interstate. The power to do this can not be more restricted and can not be less comprehensive, if Congress elects to perform its duty of regulation through private individuals or private corporations.

An important memorandum on the subject of the powers of Congress in respect to interstate and foreign commerce, was prepared in November, 1916—not long before his death—by Honorable Richard Olney, Attorney General and Secretary of State in Mr. Cleveland's Cabinet, and justly renowned as an eminent authority on constitutional law. A part of it is pertinent here, and is respectfully presented for the consideration of the Court:

> "1. For all the purposes and functions of commerce between the states of the United States, between such states and territories of the United States, and between such states and territories on the one hand and foreign nations on the other, the United States is one country, with complete and exclusive jurisdiction over the whole subject—and state lines and jurisdictions are without significance.
>
> "2. Commerce, in the constitutional sense, covers transportation and intercourse

in all forms and whether existing when the constitution was adopted or since introduced and practiced.

"3. The national commerce power, being of such extent and exclusiveness, necessarily subjects to national regulation and control all the agencies and instrumentalities by which national commerce is carried on.

"4. It cannot be doubted that a railroad corporation created by a national charter is an apt instrument for the carrying on of national transportation and that the organization of such a corporation with all appropriate powers and duties is a fit subject for treatment under the commerce power.

"5. Nor is it to be doubted—because ample experience has shown—that, in this matter of national transportation by railroads, public policy and the public welfare are at one with the law of the country. They imperatively require that the subject should be dealt with in all its phases by a single authority which can be no other than the nation itself. The mixed jurisdiction over the subject now prevailing—the states exercising a part mostly through state charters and the United States a part mostly through the commerce power—is thoroughly archaic, originated before the true scope of the commerce power was generally understood, and has resulted in a serious waste and inefficiency in railroad operation which is at once matter of public notoriety and public scandal.

"6. In view of the settled law of the land as respects the national commerce power—as by virtue of it the United States prac-

tically undertakes to exercise the power for the benefit of the several states and of all the people—and as transportation by railroad is within that power and is today in a condition most unsatisfactory to the private owners of railroads as well as seriously prejudical to the national interests—the question is of the remedy for that condition."

II.

THE WAR POWER.

The War Power, standing alone, is adequate to sustain the validity of the power exercised by Congress with reference to the state rates of carriers engaged in interstate commerce, by paragraphs (3) *and* (4) *of Section* 13 *of the Interstate Commerce Act.*

This Court has held, in the case of *Northern Pacific Railway Company v. North Dakota,* 250 U. S., 135, that the war power of Congress extends to the regulation of intrastate rates.

The only question is as to when and under what circumstances the war power may be exercised. There can be no controversy as to its extent in the matters here involved.

The power in the case just referred to was exercised during a state of actual hostilities.

But the war power does not exist only during war.

That it includes the power to guard against a renewal of a conflict and to remedy evils arising

from its rise and progress appears from the case of *Hamilton v. Kentucky Distilleries,* 251 U. S., 146.

It likewise, in order to be adequate, must extend to all reasonable measures of preparation. The one great lesson of the European War is the necessity for preparation as a means of successful war.

From 1914 to 1918, one nation—supplemented, it is true, by the cooperation of a few minor nations—one nation of some 70 millions of population, stood out against the combined power of other European nations, vastly superior in resources and in population, and waged a war which from its beginning almost to its end threatened the world with the armed domination of Germany. This happened because of Germany's preparation for war—because, prior to the beginning of actual hostilities, it was organized in all its industrial, economic and military relationships to throw at once its whole force into war, and, among other means of preparation, it had designed, constructed and maintained its facilities of transportation in such way as to be available for the immediate transportation of its armies to its frontiers and the immediate and effective mobilization of all its national resources.

The history of this war—its long continuance, its threatened outcome, the necessity for United States and other nations to throw their armies and navies and all their resources into the conflict,—has taught the lesson to the world that preparation in advance is essen-

tial to national safety and must not only be included in the war power, but must be exercised to the extent, at least, of creating and establishing the fundamentals of national organization and of making available within a reasonable time the national resources.

Thus there can be no doubt that the war power includes the power of reasonable preparation and organization for purposes of national defense.

It is proper, therefore, to inquire whether the "fostering and preservation in full vigor of rail and water transportation" is a reasonable means of preparation and organization in times of peace for the efficient performance of the war duty and the effective exercise of the war power, and whether it is so closely related to the exercise of the power as to come within its scope.

It has been treated so both by Congress and the President.

In the Joint Resolution declaring the existence of a state of war between the Imperial German Government and the Government and people of the United States, Congress provided as follows:

> "That the President be, and he is hereby, authorized and directed to employ the entire Naval and Military forces of the United States and the resources of the Government to carry on war against the Imperial German Government; and, to bring the conflict to a successful termination, all of the resources of the country are hereby pledged by the Congress of the United States."

This was on April 6, 1917.

Prior to this time, namely, on the 29th of August, 1916, Congress had expressed its view, as to the appropriate means of carrying on war, by empowering

> "The President, in time of war, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion, as far as may be necessary, of all other traffic thereon, for the transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."
>
> *Army Appropriation Bill,* August 29, 1916.

By proclamation dated December 26, 1917, the President, pursuant to this authorization, did take possession of the railroads and other systems of transportation for war purposes, and Congress in the Federal Control Act, approved March 21, 1918, authorized this control to continue throughout the war and for a reasonable time thereafter not exceeding 21 months next following the date of the proclamation by the President of the exchange of ratifications of the treaty of peace.

It is manifest, not only from the inherent importance of transportation to the effective conduct of war, but from these official acts of the Congress and of the President, that an efficient system of transportation has a direct and essential relationship to the successful exercise of the war power.

Of course, the mobilization and coordination of all industry are also important, but agriculture,

manufacture and even mining may be legitimately considered as further removed from the conduct of war and their control not so reasonably and closely related to the exercise of the power as to justify treating them, by way of preparation, as, in the discretion of Congress, the existence and adequacy of the means of transportation may be treated.

No one will deny that, if there were no railroads, Congress might constitutionally provide, under the war power for the construction of them by the Government itself. It need not leave the nation defenceless and unable to coordinate and concentrate its resources from the mines, forests, factories and farm, at the point needed to repel invasion or to wage an aggressive campaign of national defense.

It is not by the Constitution confined to the direct construction of these essential means of successful war. It may authorize such construction by private corporations or individuals or it may avail itself of those already in existence.

Cherokee Nation v. Kansas Ry. Co., 135 U. S., 641.

California v. Central Pacific Ry. Co., 127 U. S., 1.

In fact, in the language of Justice Brandeis, "to Congress in the exercise of its powers, not least the war power on which the very life of the nation depends, a wide latitude of discretion must be accorded."

Hamilton v. Kentucky Distilleries, 251 U. S., 163.

In the exercise of this discretion, Congress may reasonably determine that it would be an unwise and unnecessary expenditure, and would constitute economic waste, to duplicate at the national expense the existing systems of transportation and that the public interest would be better served by "fostering and preserving" them "in full vigor."

This in section 500 of the Transportation Act, 1920, is expressly declared to be the policy of Congress and important functions in connection with the promotion, encouragement and development of inland water transportation are devolved upon the Secretary of War.

The view that this national policy need not be undertaken under the condition and limitation of placing the entire burden of one class of the traffic of these carriers, and that the cost may be equitably distributed by national authority so as to include both their state and interstate traffic, is presented and elaborated in a subsequent part of this brief.

We accordingly submit that the following propositions cannot be successfully questioned:

1. That the War Power of Congress under the Constitution is not confined, in its exercise, to an actual state of war or to dealing with the consequences of actual war, but also includes all measures of proper, reasonable and adequate preparation for war.
2. That the existence of an adequate and competent system of transportation,

both rail and water, reaching and making available the national resources for supplying and provisioning armies and navies, and transporting troops and munitions of war, is essential to the effective and successful exercise of the war power and the performance of the war duty, and is so closely and directly related to the power itself as to become an integral part of it.

3. That, in view of the time and expenditure necessary to the construction of such a system of transportation by the Government itself, it may, in the exercise of its constitutional discretion, instead of doing so, adopt the policy, under the war power, of fostering and promoting the existing systems of transportation, so that they may at all times be ready and adequate for these essentials.
4. That this may, under the War Power, be done in time of peace by way of reasonable preparation for war, just as it may be done in time of actual war.
5. That coming under the due and reasonable exercise of the War Power, Congress may in its discretion, as a means of fostering and promoting in full vigor these essential agencies, control and regulate, within constitutional limitations, their rates and charges, both state

and interstate—otherwise it would be in the power of the states to obstruct and defeat the war power which the states themselves conferred upon Congress and the exercise of which, for the protection of themselves and their people, they have the right to exact from Congress.

Northern Pacific Ry. Co. v. North Dakota, 250 U. S., 135.

III.

THE POWER TO ESTABLISH POST OFFICES AND POST ROADS.

The power to establish Post Offices and Post Roads, standing alone, is adequate to sustain the validity of the power exercised by Congress with reference to the State rates of carriers engaged in interstate commerce, by paragraphs (3) *and* (4) *of Section* 13 *of the Interstate Commerce Act.*

Referring to laws involving this same constitutional basis of authority, Mr. Justice Bradley, speaking for this Court, says:

> "It cannot at the present day be doubted that Congress, under the power to regulate commerce among the several States, as well as to provide for postal accommodations and military exigencies, has authority to pass these laws."
>
> *California vs. Pacific Railroad Co.,* 127 U. S., 39.

For a most intelligent and interesting treatment of the Post Office and Post Road power, as related to this subject, see an article by Judge Edgar Howard Farrar, printed for the convenience of the Court in an Appendix to this brief.

We submit that there is no escape from the conclusion that under the Commerce Power, under the War Power, and under the power to establish Post Offices and Post Roads, the authority of Congress to enact the legislation involved in this case is ample and not open to question.

SECOND.

The Legal Interpretation of Paragraphs (3) and (4) of Section 13 of the Interstate Commerce Act.

Inasmuch as Congress has ample power under the Constitution to regulate the instrumentalities of transportation, to provide for their adequacy and efficiency, and to foster and preserve them in full vigor, the question remains what it has done, as to matters involved in this case, in the Transportation Act, 1920.

To arrive at a just conception of the problem Congress had in mind, and was dealing with when it enacted the legislation referred to, a brief review of the conditions as they then prevailed may be helpful.

The system of regulation which was then in force—as it was first adopted, and as it had existed for thirty years—was corrective only, and took no

note of any public interest except the interest to be protected against abuses and wrongs on the part of those charged with the duty of furnishing transportation.

This grew out of the controversy between the owners of the railroads and the public when the public first insisted on exercising the power of regulation.

In the early development of rail transportation, the interest of the public to obtain the advantage of these improved facilities was the only aspect of the matter that appeared, and every inducement was offered by legislative bodies—local, state and national—to induce private investment in the creation of this modern system.

Under this policy of inducement and encouragement, investors in railroad facilities came to view the properties which they created as their own private property to be dealt with and dealt in in their private interest just as any other property which was owned without qualification or restriction. This resulted in serious abuses. Favoritism, as between individuals and as between localities, arose and assumed such proportions as to arouse a deep sense of public resentment. The public thereupon sought to establish the principle that the relationship of these great agencies of transportation and distribution was so close and so influential in its bearing upon the public welfare, that the public had a right to protect itself against abuses by imposing upon this class of property a substantial measure of regulation.

In the controversy which arose from these opposing views, public opinion became so aroused that when the principle of regulation was established, the measures to carry it into effect had reference alone to the repression and correction of abuses.

Under this corrective and repressive system, whatever abuses there were disappeared, but, in the corrective process, the financial vitality of the carriers was impaired, and they were substantially weakened in their capacity to provide facilities for the performance of their essential public duties.

It thus became important that those charged with the duties of transportation should bring this situation, with its menace of destructive consequences, to the great bar of public opinion and to impress upon it the necessity for the introduction into the system of regulation of the elements of encouragement and protection which up to that time were entirely lacking.

An effort was made to do this from time to time in a desultory and unorganized way prior to 1914, but, on the breaking out of the European War, conditions became so serious that an earnest and coordinated movement was inaugurated to bring the public mind to a realization of the existence and importance of the problem.

A committee of railroad executives visited the President and in a formal way laid the matter before him. The President responded sympathetically and helpfully, with the final result that in 1915 he brought the matter in a message to the

attention of Congress, which, in response to his suggestion, created a joint committee, known as the Newlands Committee, to study the whole transportation situation.

Before that committee, the subject was carefully presented and the insistence was made that the constant input of new money was essential to the growth of transportation facilities to keep pace with the growth of commerce; that the money to make these additions and improvements must, under a system of private ownership, be attracted and could not be coerced, and that, in consequence, the credit of these carriers was, in importance, even greater in its interest and consequences to the public than to the carriers themselves.

The entrance of the United States into the European War, the consequent taking possession of the railroads by the President in the public interest, and their support during the federal control out of the public treasury, postponed for the moment the problems under consideration by the Newlands Committee; but these reappeared as the time approached for the return of the properties to their owners and the resumption by them of the duties and responsibilities of furnishing transportation to the public.

The tragic events of the war concentrated public attention upon many problems which were theretofore treated with indifference, and among the lessons which were taught the American people by the part which transportation played during the war in the co-ordination and direction of the

resources of nations, was a realization of the essential dependence of the producing and commercial public upon adequate means of distribution; creating a conviction in the public mind that an efficient system of transportation was absolutely essential to the public welfare; that, in order to secure it under a system of private ownership, the credit of the carriers must be fostered and protected, and that, in consequence, the essential elements of encouragement and protection must be included in any wise system of legislative regulation.

The outgrowth of this was the adoption of the Transportation Act, 1920. For the first time in the history of regulation, the truth was recognized that the most costly system of transportation to a people is an inadequate system, that the public interest is not alone and is not principally concerned with the charges it must pay for a transportation service, but is, in a more fundamental and in a higher degree, involved in the competency and adequacy of the facilities on which their opportunity to do business at all is dependent, and that, consequently, while the public interest in the rate of charge is great, its interest is even greater and more fundamental in the adequacy and efficiency of the transportation service.

The necessity for a change in the system and spirit of regulation was thus presented to Congress by the President in his message of December 2nd, 1918:

"The one conclusion that I am ready to state with confidence is that it would be a disservice alike to the country and to the owners of the railroads to return to the old conditions unmodified. Those are conditions of restraint without development. There is nothing affirmative or helpful about them. What the country chiefly needs is that all its means of transportation should be developed, its railways, its waterways, and its countryside roads. Some new element of policy, therefore, is absolutely necessary—necessary for the service of the public, necessary for the release of credit to those who are administering the railways, necessary for the protection of their security holders."

Thus the conception of regulation was broadened to embrace, not only reasonableness of rates, but adequacy of revenues to insure adequate service. It came to be realized that an indubitable public interest required that a system of regulation should not alone repress and correct abuses, but should also insure to the public the transportation facilities which it needs; that, in other words, any system of regulation, to be wise and useful in the public interest, must not only "get over but must get under" the carrier systems of the country.

These constructive policies found expression in the Transportation Act, 1920.

In Section 500 of that Act, it is declared to be the policy of Congress "to foster and preserve in

full vigor both rail and water transportation," and, in Section 422 (Sec. 15a, paragraph 3 of the Interstate Commerce Act), the Commission was directed, in making its determination as to a fair return on the property devoted to the public use, "to give due consideration, among other things, to the transportation needs of the country, and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation."

Thus Congress, in the act now under consideration, undertook to create and to preserve adequate and competent instrumentalities of transportation to serve the commerce of the people.

It provided that the revenues derived from the rates of these carriers shall be adequate for these purposes.

The contention here made that it was the purpose of Congress to provide for the support and success of this national policy of transportation out of the revenues derived from interstate commerce alone, leaving the question of whether the several states would participate in this burden, or would leave it all to rest upon interstate commerce, cannot be accepted.

The result of this would be either that the national conception of the standard of transportation facilities must be abandoned because of dissenting state opinion, or the means of sustaining it up to the national standard be cast upon the

interstate part of the carrier's services, or largely upon that and the balance on the internal commerce of those states which approved of the national standard of transportation facilities, desired its establishment, and were willing to contribute to its support.

The effect of this triumph of dissenting state opinion would be that the dissenting state would, in a very real sense, regulate interstate commerce —for it would either control the standard of interstate commercial facilities or, in order that these might be maintained up to the national standard, it would force up and thus regulate the rates which must be paid by interstate shippers and by shippers of other states in their internal commerce. This would make the dissenting states dominant in the national field, and, as to their sister states taking a more liberal view, would deprive them of the right they acquired as states, in the compact of the Constitution, to have the instrumentality of transportation in which all are interested regulated and controlled, not by one of the states or by several of the states, but by the authority which represents them all.

The Transportation Act, 1920, must clearly be construed as not permitting such a consequence. It must, if possible, be construed as providing in the ultimate result, for an equality of opportunity to all users of the instrumentality of interstate commerce, and to prevent unduly discriminatory advantages to any of them, whether these users avail themselves of the service of the instrumentality of

interstate commerce in the commerce between the states or in the commerce within a state.

Any other interpretation of the act would result in the abdication by Congress of its national obligation of providing for equity among the users of the instrument of interstate commerce and in the creation of a series of discriminations which would dislocate many of the most important trade relationships in the country.

If, for example, Congress must fix the level of interstate rates between Pittsburgh and New York on a level to support an adequate and efficient system of transportation, and if the state of Pennsylvania could validly disregard this standard and put in a preferential and lower level of rates between Pittsburgh and Philadelphia, it will be seen at once that the whole constitutional system (which, by placing the control of the regulation of the instrumentalities of interstate commerce in the hands of the national government, was designed, among other things, to insure equality of opportunity as between state and interstate trade), would be destroyed and the channels of trade would be changed by the capacity for preference and advantage retained by local governments. Thus, instead of the system of undue advantage and favoritism, which aroused the public opinion of the country against private managements and which was the efficient cause of the adoption by Congress and the states of the policy of regulation, being abolished, it would be simply transferred from private hands and placed in unqualified and uncon-

trolled operation in the hands of local governments.

No construction of an act, unless imperatively required by the express terms which Congress has used, can be tolerated which produces these results.

Instead of finding in the Transportation Act, 1920, terms which force such a construction, we find that the purpose of Congress, as therein expressed, was directly the reverse. It is true that it did not deal with the primary jurisdiction over state rates and over interstate rates in the same way; but it did in unmistakable terms assert a jurisdiction over the ultimate and final regulation of both—over interstate rates as a matter of primary jurisdiction and over state rates as a matter of supervisory jurisdiction as defined in the Act.

In Section 422 (Sec. 15*a* of the Interstate Commerce Act), the Commission is required to find the aggregate value of the property of the carriers held for and used in the service of transportation, and is not permitted to exclude any part of it because used for state transportation, or to make any distinction between that which is used in state service and that which is used in interstate service. The obligation is plainly laid upon the Commission to value and include it all.

Likewise, when it comes to the question of the "fair return" prescribed by the act (which the act requires shall be 5½ or 6 per cent, as near as practicable, on the aggregate values for the first two years, and, after that, such percentage as the Commission may determine will constitute a fair

return), no exclusion is permitted of the revenues derived from state traffic, but the return which must be provided is required to come from all traffic, state and interstate.

The contention insistently made that a different result must follow from the provision in Section 400 of the Transportation Act, 1920, which is thereby made a part of Section 1 of the Interstate Commerce Act, namely, that "the provisions of the act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage or handling of property, wholly within one state and not shipped to or from a foreign country from or to any place in the United States as aforesaid" is unsound, for two reasons, either one of which we submit is conclusive.

First: The clause just quoted was in express terms a part of Section 1 of the Act to Regulate Commerce as it stood prior to the Transportation Act, 1920, and was a part of that act at the time of the decision by this Court of the case of *Houston & Texas Railway v. United States,* 234 U. S., 342, in which the Court, beginning at page 356, but more particularly on page 358, considered and defined the proviso, now in the Transportation Act, 1920, in a case involving control of state rates by the Interstate Commerce Commission when discriminatory under the terms of the statute as it then stood.

The Court says:

> "Here, the Commission expressly found that unjust discrimination existed under

substantially similar conditions of transportation and the inquiry is whether the Commission had power to correct it. We are of the opinion that the limitation of the proviso in Section 1 does not apply to a case of this sort. The Commission was dealing with the relation of rates injuriously affecting, through an unreasonable discrimination, traffic that was interstate. The question was thus not simply one of transportation that was 'wholly within one state.' These words of the proviso have appropriate reference to exclusively intrastate traffic, separately considered; to the regulation of domestic commerce, as such. The powers conferred by the act are not thereby limited where interstate commerce itself is involved. This is plainly the case when the Commission finds that unjust discrimination against interstate trade arises from the relation of intrastate to interstate rates as maintained by a carrier subject to the act. Such a matter is one with which Congress alone is competent to deal, and, in view of the aim of the act and the comprehensive terms of the provisions against unjust discrimination, there is no ground for holding that the authority of Congress was unexercised and that the subject was thus left without governmental regulation."

This authoritative exposition of the law was before Congress when it inserted in the Transportation Act, 1920, the same words as those previously contained in the proviso to Section 1 of the Inter-

state Commerce Act, and the intention of Congress is thus manifest not to exclude by these words the exercise of national power over the relation of state rates to interstate rates, or as to discrimination between the two, or as to discrimination of state rates against the entire body of interstate commerce.

Second: The view that the clause referred to must be construed as an exclusion by Congress of jurisdiction of the Interstate Commerce Commission over the question of discrimination of state rates against interstate or foreign commerce, is plainly answered by the fact that in Section 416 of the Transportation Act, 1920 (paragraphs 3 and 4 of Section 13 of the Interstate Commerce Act), Congress in express terms extends the power of the Interstate Commerce Commission over such discriminations.

In the face of this direct expression of Congress, the suggestion is plainly untenable that the retention in the Transportation Act, 1920, of the proviso to Section 1 of the Interstate Commerce Act as previously existing has significance or importance as to the questions involved in this case.

Accordingly, the Transportation Act, 1920, must be construed as dealing with all rates necessary to be controlled in order to carry out the declared purpose of the act to provide revenues for the carriers sufficient in the public interest to ensure the adequacy and efficiency of the transportation service.

It is true, as above indicated, that Congress

finally determined to deal with these two classes of rates, interstate rates and state rates, in a different way.

It was urged upon Congress that the only effective method of dealing with the subject, in order to avoid destructive delays, discriminations and inequalities, and in order to meet economic conditions, was for it to assume control and regulation of all of the rates of intrastate carriers as a matter of primary and original jurisdiction.

Congress, out of deference to the states, declined to take this view, and adopted the policy of dealing directly and primarily with interstate charges and of leaving the state rates to be dealt with primarily by the states, asserting a supervisory and corrective authority over state action only in cases of discrimination against interstate commerce. But, in the final result, it unmistakably undertook, in the act, to deal ultimately with both classes of rates—with interstate rates absolutely and primarily, and with states rates to the extent necessary to remove undue or unreasonable prejudice, advantage or discrimination, and then not as a primary, but as a supervisory authority.

No other construction of the act is tenable unless the declared purpose of the legislation is to be defeated.

It is contended that paragraphs (3) and (4) of Section 13 of the Interstate Commission Act, as added by Section 416 of the Transportation Act,

1920, have no broader reach, as to subject matter, than Section 3 of the Interstate Commerce Act.

This contention, of course, depends upon the construction which may be given to Section 3 of the Interstate Commerce Act. If, under a proper construction, Section 3 is as broad as the new provisions referred to unmistakably are, then the question of whether the power of the Commission has been extended by the provisions of the Transportation Act, 1920, becomes immaterial.

Manifestly Section 3 of the Interstate Commerce Act is, in the opinion of this Court, sufficiently broad to cover a discrimination against interstate commerce itself, for, in the case of the *Illinois Central Railroad Company vs. The Public Utilities Commission,* 245 U. S., 507, it said:

> "Had it (the Commission) intended to require or authorize a state-wide readjustment of intrastate rates, it doubtless would have given direct expression to that purpose which easily could have been done in a few lines."

It does not seem necessary, however, to concern ourselves with any nice distinctions as to the meaning of Section 3 of the Interstate Commerce Act, for paragraphs (3) and (4) of Section 13 of the Interstate Commerce Act, as added by the Transportation Act, 1920, confer, in unmistakable terms, the authority claimed and exercised by the Commission in this case.

Undoubtedly, however, paragraphs (3) and (4) undertook to deal with the question in a somewhat

different way from the way it is dealt with in Section 3 of the Interstate Commerce Act.

The prohibitions of Section 3 of the Interstate Commerce Act are in express terms directed to the conduct of the carrier, whereas in paragraph (3) of Section 13 it is not the conduct of the carrier, but the acts done by the state or under its authority or by the President under the federal control act, which are dealt with.

In paragraph (4) authority is conferred upon the Commission to establish a state rate in the place of the one which under the provisions of that section it condemns.

And unmistakably too, whether or not this is a power already possessed by the Commission under Section 3 of the Interstate Commerce Act, the Commission is, by the Transportation Act, empowered and directed to determine the question as to whether anything done, either by the state or under its authority, as to state rates, etc., causes any undue or unreasonable advantage, preference or prejudice as between persons and localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable or unjust discrimination against interstate or foreign commerce as a whole. The Commission is thereby given the power, and it is made its duty to protect the body of interstate and foreign commerce against undue or unreasonable preferences, prejudices and discriminations created by the act of a state or under its authority.

It takes no argument to show, if the revenues permitted by a state from state traffic do not bear a proper relationship to the revenues which Congress in this act has required the Commission to provide from interstate commerce, that there is an unjust and hurtful discrimination against interstate commerce.

If this is not so, then interstate commerce must under the requirements of the act continue to move on more disadvantageous terms than state traffic, and those who engage in state traffic can do their business on better terms than those who engage in interstate traffic. Under such conditions, the volume of interstate traffic would be diminished to the extent that the state traffic done on more advantageous terms can take its place and the channels of trade and the interest of communities and their business relationship will be altered by the fact as to whether or not the business originates on one side or the other of a state line.

The phrase here used, "unjust discrimination," manifestly was not intended to have any technical or strained construction, and was not intended to have such a construction as would disappoint the large purpose of the act, which was to provide revenues for the carriers sufficient to ensure, in the public interest, adequate and efficient transportation facilities and to ensure equality of treatment among all those availing themselves of the transportation service.

In fact the terms "unjust discriminations" are used by the Commission itself as including such

expressions as "undue prejudice" and "undue burden upon interstate commerce."

Natchez Chamber of Commerce v. L. & A. Ry. Co., 58 I. C. C., 618.

In that case the Commission says, after referring to the case as involving the question of "discrimination":

> "In this proceeding we are called upon to prescribe reasonable rates for the future between Natchez and points in western Louisiana and to remove such undue prejudice as may be found to exist. If in doing this an increase in the rates applying within western Louisiana results, it is manifest that the present rates are unduly low (that is state rates) and constitute an undue burden upon interstate commerce."

This undue burden was, in that case, dealt with by the Commission under its power to prevent undue prejudice and unjust discrimination.

Manifestly no other conclusion could be reached and manifestly when Congress undertook to deal with and protect the whole body of interstate commerce against undue prejudice and unjust discrimination, it was, from a legal standpoint, unnecessary for it to go futher and to condemn, with meticulous particularity, "undue burden," that being covered by the terms already used.

When it is remembered that under 15a of the Interstate Commerce Act it is made the duty of the Commission to provide revenues up to a certain standard and to supply out of interstate commerce

all that is not contributed by state commerce, and that thus, in the instant case, if the state can effectively prevent the contribution from state business of the part of the revenues which it was assumed in *Ex Parte* 74 they would contribute, then it would become necessary, under the law, for the Interstate Commerce Commission to increase again the rates on interstate commerce to produce the result required by the Act. Thus, if the power here claimed by the appellants may be exercised by them, the result would be, under the automatic operation of the Transportation Act, a further increase of interstate rates and a further discrimination against interstate commerce.

Congress had in view no narrow purpose.

In this case there is brought to the Bar of this Court the broad and reasonable policy adopted by Congress to deal with the entire subject of transportation from a national standpoint and to provide for its adequacy and competency, in the interest of all the people, by a system which will foster and preserve its instrumentalities in full vigor and will create equality of commercial opportunity and privilege as between all its users, irrespective of their location and irrespective of the markets which they seek to reach.

The contention which we make is, we submit, justified by the broad national purpose expressed in this act, and by the moral considerations of equity and of equality of opportunity to all the people, with favoritism towards none and with special privilege made impossible.

THIRD.

THE EXERCISE BY THE COMMISSION, IN THIS CASE, OF THE POWER CONFERRED UPON IT BY PARAGRAPHS (3) AND (4) OF SECTION 13 OF THE INTERSTATE COMMERCE ACT (SECTION 416 OF THE TRANSPORTATON ACT, 1920).

This subject has been treated at length by us in a separate brief, and we respectfully ask the attention of the Court to the views there presented. It is unnecessary to repeat them here.

We submit on the whole case that the order appealed from should be affirmed.

Respectfully submitted,

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Washington, D. C., October 10, 1921.

APPENDIX

Reprint of an article entitled "The Post-Road Power in the Federal Constitution and Its Availability for Creating a System of Federal Transporation Corporations," by Hon. Edgar Howard Farrar, published under date of September 9th, 1907.

FORE-NOTE

A draft of the within paper was prepared to be read before the American Bar Association at Portland, Me., at its August meeting, but the Executive Committee could not give it a place on account of the crowded condition of the previously arranged program. It is now given to the public and to the profession, as my answer to the criticisms made upon a letter written by me to President Roosevelt in April, suggesting the use of the post-road clause of the Federal Constitution by creating Federal Post-Road Corporations, as an available means to bring about a Federal control of transportation, and a drastic control of transportation corporations, coupled with their full protection from the destructive action of their enemies within and without.

EDGAR HOWARD FARRAR.

Sept. 9th, 1907.

The Post-Road Power in the Federal Constitution and Its Availability for Creating a System of Federal Transportation Corporations.

The object of this paper is to demonstrate that, under the express grant of power made in the Constitution of the United States "to establish post-offices and post-roads," the Congress may organize a system of national post-road corporations as instrumentalities of the Federal Government to construct and operate post-roads, with the incidental power to deal in transportation of persons and property, inasmuch as transportation is of the essence of the governmental function, to assist in the performance of which these corporations are created.

The right of the Federal Government to create corporations as an incident to the grants of power and function made to it in the Constitution, and as a necessary and proper means to enable it to exercise these powers and functions, was settled in the great cases of McCulloch *vs.* State of Maryland, 4th Wheaton, 316, and Osborn *vs.* U. S. Bank, 9 Wheaton, 738, which affirmed the constitutionality of the charter of the second Bank of the United States.

The authority of those cases has never been shaken nor diminished. On the contrary, the principles therein announced have been approved and restated again and again by the courts of the Nation, and the Congress has acted upon them in using its powers to charter corporations.

Upon these principles rests the whole system of national banks. In regard to these corporations, the Supreme Court of the United States in Farmers' Bank *vs.* Dearing, 91 U. S., 29, said:

"The constitutionality of the act of 1864 is not questioned. It rests on the same principle as the act creating the second bank of the United States. The reasoning of Secretary Hamilton and of the Court in McCulloch *vs.*

Maryland, and in Osborn *vs.* U. S. Bank therefore applies. The national banks organized under the act are instruments designed to be used to aid the Government in the administration of an important branch of the public service. They are means appropriate to that end. Of the degree of the necessity which existed for creating them, Congress is the sole judge."

Under its war power the Congress created a corporation called "The National Home for Disabled Volunteer Soldiers," and in Butler *vs.* National Home, etc., 144 U. S., p. 64, it was held that such corporation could remove a suit against it to the Federal Court on the principle settled in The Pacific Railroad Removal Cases, 115 U. S., 1, that every suit by or against a Federal corporation is one arising under the Constitution and Laws of the United States.

Pitching its power to act upon three distinct grants in the Constitution, the power to regulate commerce among the States, the power to establish post-offices and post-roads and the war power, the Congress has chartered three great transcontinental systems of railroad, the Union Pacific Railroad, The Northern Pacific Railroad and the Texas & Pacific Railroad.

In California *vs.* Pacific Railroad Company, 127 U. S., p. 39, speaking of these corporations and deciding that the franchises of the Union Pacific Company were, as federal franchises, beyond the power of the State of California to tax, the Supreme Court of the United States said:

"It cannot at the present day be doubted that Congress under the power to regulate commerce among the several States, as well as to provide for postal accommodatons and military exigencies, had authority to pass these laws. The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from State to State, is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain

such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce. This power in former times was exerted to a very limited extent, the Cumberland or National road being the most notable instance. Its exertion was but little called for, as commerce was then mostly conducted by water, and many of our statesmen entertained doubts as to the existence of the power to establish ways of communication by land. But since, in consequence of the expansion of the country, the multiplication of its products, and the invention of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed and led to the conclusion that Congress has plenary power over the whole subject. Of course, the authority of Congress over the Territories of the United States, and its power to grant franchises exercisable therein, are, and ever have been, undoubted. But the wider power was very freely exercised, and much to the general satisfaction, in the creation of the vast system of railroads connecting the East with the Pacific, traversing States as well as Territories, and employing the agency of State as well as Federal corporations. See Pacific Railroad Removal Cases, 115 U. S., 1, 14, 18."

This language of Mr. Justice Bradley, speaking for the whole Court, has been twice quoted and affirmed, first by Mr. Justice Harlan speaking for the whole Court in Cherokee Nation *vs.* Kansas Railway Co., 135 U. S., at page 658, a case which will be further discussed below, and second by Mr. Justice Gray, speaking for the whole Court in Luxton *vs.* North River Bridge Company, 153 U. S., p. 533, affirming the constitutionality of the act of the Congress of July 11th, 1890, incorporating the North River Bridge Company, authorizing it to locate, construct and maintain a bridge and its approaches over the Hudson River between the City of New York and the State of New Jersey, and to exercise the power of eminent domain for that purpose in the Courts of the United States.

It will be noted that the Congress in chartering this

company followed the precedent laid down in the Pacific Railroad acts of incorporation, and pitched its action on the commerce, the postal and the war powers.

Whatever may have been the early opinion of lawyers, dissenting judges, politicians and statesmen of the strict constructionist school, it is now settled beyond controversy that the Federal Government has the power of eminent domain to be exercised in its own courts for all the purposes of the grants made to it in the Constitution, that it may delegate this power to corporations created by it or to State corporations selected by it as its agents, and that this power may be exercised without the consent or permission of the States.

This power was not used or declared until a late date in the history of the Republic, and was established in Kohl *vs.* United States, 91 U. S., 367, which was a proceeding by the United States in the Circuit Court of the United States to condemn land in the City of Cincinnati for a federal court building.

The Court said:

"It has not been seriously contended during the argument that the United States Government is without power to appropriate lands or other property within the State for its own uses, and to enable it to perform its proper functions. Such an authority is essential to its independent existence and perpetuity. These cannot be preserved if the obstinacy of a private person, or if any other authority, can prevent the acquisition of the means or instruments by which alone governmental functions can be performed. The powers vested by the Constitution in the general Government demand for their exercise the acquisition of lands in all the States. These are needed for forts, armories, and arsenals, for navy-yards and lighthouses, for custom houses, post-offices, and court houses, and for other public uses. If the right to acquire property for such uses may be made barren a right by the unwillingness of property-holders to sell, or by the action of a State prohibiting a sale to the Federal Government, the constitutional grants of power may be rendered nugatory, and the Government is dependent for its practical

existence upon the will of a State, or even upon that of a private citizen. This cannot be. No one doubts the existence in the State governments of the right of eminent domain,—a right distinct from and paramount to the right of ultimate ownership. It grows out of the necessities of their being, not out of the tenure by which lands are held. It may be exercised, though the lands are not held by grant from the Government, either mediately or immediately and independent of the consideration whether they would escheat to the Government in case of a failure of heirs. The right is the offspring of political necessity; and it is inseparable from sovereignty, unless denied to it by its fundamental law. Vattel, c. 20, 34; Bynk., lib. 2, c. 15; Kent's Com., 338-340; Cooley on Const. Lim., 584 *et seq.* But it is no more necessary for the exercise of the powers of a State government than it is for the exercise of the conceded powers of the Federal Government. That government is as sovereign within its sphere as the States are within theirs. True its sphere is limited. Certain subjects only are committed to it; but its power over those subjects is as full and complete as is the power of the States over the subjects to which their sovereignty extends. The power is not changed by its transfer to another holder.

"But, if the right of eminent domain exists in the Federal Government, it is a right which may be exercised within the States, so far as is necessary to the enjoyment of the powers conferred upon it by the Constitution. In Ableman *vs.* Booth, 21 How., 523, Chief Justice Taney described in plain language the complex nature of our Government, and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its power, and each, within its sphere of action, prescribed by the Constitution of the United States, independent of the other. Neither is under the necessity of applying to the other for permission to exercise its lawful powers. Within its own sphere, it may employ all the agencies for exerting them which are appropriate or necessary, and which are not forbidden by the law of its being. When the power to establish post offices and to create courts within the States was conferred upon the Federal Government, included in it was authority to obtain sites for such offices and for court houses, and to obtain them by such means

as were known and appropriate. The right of eminent domain was one of those means well known when the Constitution was adopted, and employed to obtain lands for public uses. Its existence, therefore, in the grantee of that power, ought not to be questioned. The Constitution itself contains an implied recognition of it beyond what may justly be implied from the express grants. The Fifth Amendment contains a provision that private property shall not be taken for public use without just compensation. What is that but an implied assertion that, on making just compensation, it may be taken? * * *

"It is true, this power of the Federal Government has not heretofore been exercised adversely; but the non-user of a power does not disprove its existence. * * * If the United States have the power it must be complete in itself. It can neither be enlarged nor diminished by a State. Nor can any State prescribe the manner in which it must be exercised. The consent of a State can never be a condition precedent to its enjoyment. Such consent is needed only, if at all, for the transfer of jurisdiction, and of the right of exclusive legislation after the land shall have been acquired."

In U. S. vs. Fox, 94 U. S., 315, the Court, while maintaining the power of a State to regulate the tenure of real estate, and consequently holding void a bequest of real estate to the United States, reaffirmed the doctrine of the Kohl case.

United States *vs.* Jones, 109 U. S., 513, was a proceeding by the United States in a State court, under the authority of an Act of the Congress, to determine the value of lands damaged by the improvement of the Fox River by the Government. The Court held that the power to take private property for public uses in the exercise of the right of eminent domain is an incident of sovereignty, belonging to every independent government, and requiring no constitutional recognition, that it exists in the Government of the United States, and that that Government may delegate to a tribunal, created under the laws of a State, the power to fix the amount of compensation

to be paid by the United States for private property taken by them in the exercise of their right of eminent domain.

Van Brocklin *vs.* State of Tennessee, 117 U. S., 151, involved the question as to the power of a State to tax lands acquired by the United States within the limits of a State without the State's consent, and in the course of the decision that no such power exists, the Court restates and reaffirms the Kohl case, and states that the power of eminent domain may be exercised "with or without the concurrent act of the State in which the land is situated" (p. 154).

Fort Leavenworth R. R. Co. *vs.* Lowe, 114 U. S., 525, involved the right of a State to tax a railroad built through a Government reservation, over which the State had ceded her political jurisdiction to the United States, with the express retention in the act of cession of the right to tax the property and franchises of such corporations, located on the reservation. The Court held that such retention was valid as it did not interfere with the use of the property as a military post. The doctrine of the Kohl case is restated and affirmed, and this language is used (p. 530):

"It would seem to have been the opinion of the framers of the Constitution that, without the consent of the States, the new government would not be able to acquire lands within them; and therefore it was provided that when it might require such lands for the erection of forts and other buildings for the defence of the country, or the discharge of other duties devolving upon it, and the consent of the States in which they were situated was obtained for their acquisition, such consent should carry with it political dominion and legislative authority over them. Purchase with such consent was the only mode then thought of for the acquisition by the general government of title to lands in the States. Since the adoption of the Constitution this view has not generally prevailed. Such consent has not always been obtained, nor supposed necessary, for the purchase by the general government of lands within the States. If any doubt has ever ex-

isted as to its power thus to acquire lands within the States, it has not had sufficient strength to create any effective dissent from the general opinion. The consent of the States to the purchase of lands within them for the special purposes named is, however, essential, under the Constitution, to the transfer to the general government, with the title, of political jurisdiction, and dominion. Where lands are acquired without such consent, the possession of the United States, unless political jurisdiction be ceded to them in some other way, is simply that of an ordinary proprietor. The property in that case, *unless used as a means to carry out the purposes of the Government*, is subject to the legislative authority and control of the States equally with the property of private individuals. * * * * Where, therefore, lands are acquired in any other way by the United States within the limits of a State than by purchase with her consent, they will hold the lands subject to this qualification, that if upon them forts, arsenals, or other public buildings are erected for the uses of the general government, such buildings, with their appurtenances, as instrumentalities for the execution of its powers, will be free from any such interference and jurisdiction of the State as would destroy or impair their effective use for the purposes designed. *Such is the law with reference to all instrumentalities created by the general government.* Their exemption from State control is essential to the independence and sovereign authority of the United States within the sphere of their delegated powers. But, when not used as such instrumentalities, the legislative power of the State over the places acquired will be as full and complete as over any other places within her limits."

Cherokee Nation *vs.* Kansas Railway Co., 135 U. S., 641, referred to above, presented the question of the power of the United States to grant to a State corporation organized to build an interstate railway, a right-of-way through the Indian Territory, coupled with the right to condemn the land of individual occupants. The constitutionality of the act was affirmed, the Court saying (p. 655):

"In view of these authorities, the contention that the lands through which the defendant was authorized by Congress to construct its railway, are held by the Cherokees as a sovereign nation, without dependence on any other, and that the right of eminent domain within its territory can only be exercised by it, and not by the United States, except with the consent of the Cherokee Nation, cannot be sustained. The fact that the Cherokee Nation holds these lands in fee simple under patents from the United States, is of no consequence in the present discussion; for the United States may exercise the right of eminent domain, even within the limits of the several States, for purposes necessary to the execution of the powers granted to the general government by the Constitution. Such an authority, as was said in Kohl *vs.* United States, 91 U. S., 367, is essential to the independent existence and perpetuity of the United States, and is not dependent upon the consent of the States. * * * * As was said by Mr. Justice Bradley in Stockton *vs.* Baltimore, etc., Railroad, 35 Fed. Rep., 9, 19: 'The argument based upon the doctrine that the States have the eminent domain or highest dominion in the lands comprised within their limits, and that the United States have no dominion in such lands, cannot avail to frustrate the supremacy given by the Constitution to the Government of the United States in all matters within the scope of its sovereignty. This is not a matter of words, but of things. If it is necessary that the United States Government should have an eminent domain still higher than that of the State, in order that it may fully carry out the objects and purposes of the Constitution, then it has it. Whatever may be the necessity or conclusions of theoretical law as to eminent domain or anything else, it must be received as a postulate of the Constitution that the Government of the United States is invested with full power and complete power to execute and carry out its purposes.' It would be very strange if the National Government, in the execution of its rightful authority, could exercise the power of eminent domain in the several States, and could not exercise the same power in a Territory occupied by an Indian nation or tribe, the members of which were wards of the United States, and directly subject to its political control. The lands in the Cherokee territory, like the lands held by private owners

everywhere within the geographical limits of the United States, are held subject to the authority of the general government to take them for such objects as are germane to the execution of the powers granted to it; provided only, that they are not taken without just compensation being made to the owner."

The case of Stockton *vs.* Baltimore, etc., Railroad, 32 Fed. Rep., 9, from which the foregoing quotation of Mr. Justice Bradley is approvingly made by the Supreme Court, is important and instructive. It was an information filed by the Attorney-General of the State of New Jersey against two railroad companies, one chartered by the State of New Jersey and one chartered by the State of New York, to prevent them from constructing a bridge over Arthur Kill, separating the States of New Jersey and New York, which bridge they were authorized to construct by an act of the Congress of the United States. The State set up her own legislative act prohibiting the construction of such a bridge without her consent which had never been obtained; that she owned in her sovereign right the soil under the waters of Arthur Kill from the center line thereof to the high-water mark upon which the piers of the bridge were to rest and the bridge was to stand; that this land could not be taken at all by the Congress or by any corporation authorized by it without her consent; that if it could be taken at all, compensation must be made her for such taking, for which compensation the act did not provide, and that for these reasons the act of the Congress was unconstitutional and void. The act was declared constitutional as a proper exercise of the power to regulate commerce among the States. The Court held:

1st. That the Congress had power to build the bridge without the consent of the State.

2d. That it had power to delegate this authority to State corporations.

3d. That if it is necessary that the United States Government should have an eminent domain still higher than that of the State in order that it may fully carry out the objects and purposes of the Constitution, then it has it.

4th. That the State held the lands under navigable waters not for the purpose of emolument, but for public use, especially for the public use of navigation and commerce, that consequently the use of a part of that soil for a bridge to be used for commercial purposes was not a diversion of the property from its original public use, and the State was entitled to no compensation therefor.

In Luxton *vs.* North River Bridge Company, 153 U. S., 525, already referred to, the power of the Congress to grant to a bridge company, created by it, the right to condemn property for a bridge and its approaches between the City of New York and the State of New Jersey was unanimously affirmed. Careful examination and study of this case is particularly recommended to all those journalistic expounders of constitutional law who repel with contempt any conclusion that might lead to the profanation of the (to them) sacred soil of the City of New York by a federal highway.

In U. S. *vs.* Gettysburg Electric Ry., 160 U. S., the use of the power of eminent domain by the Federal Government for a patriotic purpose—the preservation and embellishment of the battlefield of Gettysburg—was maintained; and it was likewise maintained in Chappell *vs.* U. S., 160 U. S., 499, to condemn land for a lighthouse, and the power again declared to exist "with or without any consent or concurrent action of the State."

In Monongahela Navigation Co. vs. U. S., 148 U. S., 312, the United States used, without question, the power of eminent domain to condemn a dam and lock, constructed in the Monongahela River by a company authorized by the State to improve the navigation of such river and to collect tolls for the use of the lock. The Government of the United States took over the improvement of

the river itself, and the Court held that it must pay not only for the dam and lock itself but for the franchise granted by the State under which it was operated.

Most of the cases cited holding that the Congress under the interstate commerce grant has power to organize corporations to locate, build and maintain interstate highways, and to grant such corporations the power of eminent domain for that purpose, imply, and some of them express the proposition that the Congress has itself the power to construct such highways. See the California case, *supra.*

In Luxton *vs.* North River Bridge Co., *supra,* the Court said:

"Congress has likewise the power exercised early in this century by successive acts in the case of the Cumberland or National Road from the Potomac across the Alleghenies to the Ohio, to authorize the construction of a public highway connecting several States."

In Stockton *vs* Baltimore, etc., R. R., *supra,* Mr. Justice Bradley said:

"Under this power" (to regulate commerce among the States) "the navigation of rivers and harbors has been opened and improved, and we have no doubt that canals and waterways may be opened to connect navigable bays, harbors and rivers with each other or with the interior of the country. Nor have we any doubt that under the same power, the means of commercial communication by land as well as by water may be opened up by Congress between different States, whenever it shall see fit to do so, either on the failure of the State to provide such communication, or whenever, in the opinion of Congress, increased facilities of communication ought to exist. Hitherto it is true the means of commercial communication have been supplied either by nature in the navigable waters of the country, or by the States in the construction of roads, canals and railroads, so that the functions of Congress have not been largely called into exercise under this branch of its jurisdiction and power, except in the improvement of rivers and harbors, and the licensing

of bridges across navigable streams. But this is no proof that its power does not extend to the whole subject in all its possible requirements. Indeed it has been put forth in several notable instances, which stand as strong arguments of practical construction given to the Constitution by the legislative department of the Government. The Cumberland or National Road is one instance of a grand thoroughfare projected by Congress, extending from the Potomac to the Mississippi."

In Monongahela Navigation Co. *vs.* United States, *supra*, and in Railroad Co. *vs.* Maryland, 21st Wallace, 456, it was distinctly held that the interstate commerce power of the Congress was the same over an interstate artificial highway as over a navigable water.

In the former case the Court said (p. 341):

"The theory of the Government seems to be that the right of the Navigation Company to have its property in the river, and the franchises given by the State to take tolls for the use thereof, are conditional only, and that whenever the Government, in the exercise of its supreme power, assumes control of the river, it destroys both the right of the company to have its property there, and the franchise to take tolls. But this is a misconception. The franchise is a vested right. The State has power to grant it. It may retake it, as it may take other private property, for public uses, upon the payment of just compensation. A like, though a superior, power exists in the National Government. It may take it for public purposes, and take it even against the will of the State; but it can no more take the franchise which the State has given than it can any private property belonging to an individual.

"Notice to what the opposite view would lead: A railroad between Columbus, Ohio, and Harrisburg, Pennsylvania, is an interstate highway, created under franchises granted by the two States of Ohio and Pennsylvania, franchises not merely to construct, but to take tolls for the carrying of passengers and freight. In its exercise of supreme power to regulate commerce, Congress may condemn and take that interstate highway; but in the exercise of that power, and in the taking of such property, may it ignore the franchises to take tolls, granted by the States, or must it not rather pay for them, as it pays for

the rails, the bridges, and the tracks? The question seems to carry its own answer. It may be suggested that the cases are not parallel, in that in the present there is a natural highway; while in that suggested it is wholly artificial. But the power of Congress is not determined by the character of the highway. Nowhere in the Constitution is there given power in terms over highways, unless it be in that clause to establish post-offices and post-roads. The power which Congress possesses in respect to this taking of property springs from the grant of power to regulate commerce; and the regulation of commerce implies as much control, as far-reaching power, over an artificial as over a natural highway. They are simply the means and instrumentalities of commerce, and the power of Congress to regulate commerce carries with it power over all the means and instrumentalities by which commerce is carried on. There may be differences in the modes and manner of using these different highways, but such differences do not affect or limit that supreme power of Congress to regulate commerce, and in such regulation to control its means and instrumentalities. We are so much accustomed to see artificial highways, such as common roads, turnpike roads and railroads, constructed under the authority of the States, and the improvement of natural highways carried on by the general government, that at the first it might seem that there was some inherent difference in the power of the National Government over them. But the grant of power is the same. There are not two clauses of the Constitution, each severally applicable to a different kind of highway."

The same thought was expressed in *Ex Parte* Debs, 158 U. S., 590, as follows:

"Up to a recent date commerce, both interstate and international, was mainly by water, and it is not strange that both the legislation of Congress and the cases in the Courts have been principally concerned therewith. The fact that in recent years commerce has come mainly to be carried on by railroads and over artificial highways has in no manner narrowed the scope of the constitutional provision, or abridged the power of Congress over such commerce. On the contrary, the same fulness of control exists in the one case as in the other, and the

same power to remove obstructions from the one as from the other.

"Constitutional provisions do not change, but their operation extends to new matters as the modes of business, and the habits of life of the people, vary with each succeeding generation. The law of the common carrier is the same today as when transportation on land was by coach and wagon, and on water by canal boat or sailing vessel, yet in its actual operation it touches and regulates transportation by modes then unknown, the railroad train and the steamship. Just so it is with the grant to the National Government of power over interstate commerce. The Constitution has not changed. The power is the same. But it operates today upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop."

Transportation of persons and things is an absolutely necessary incident to three separate and distinct grants of power in the Constitution, the power to regulate commerce among the States, the military power and the postal power.

The control of the Federal Government over interstate transportation is an implication from the power to regulate commerce, and an appropriate means to enable the Government to exercise its granted power. This grant is exclusive and unlimited. As well said by Mr. Justice Bradley in the Stockton case: "The power of Congress is supreme over the whole subject, unimpeded and unembarrassed by State lines or State laws, and in this matter the country is one, and the work to be accomplished is national; State interests, State jealousies and State prejudices do not require to be consulted. In matters of foreign and interstate commerce there are no States." Under this power the Federal Government has taken entire possession and control of transportation by water, and of the navigable highways of the country, even those which are solely within the limits of a State. No one may own or operate a vessel, engaged in com-

merce on any navigable water in the Nation, unless she is enrolled and licensed under the laws of the United States, unless she is inspected, if a steam vessel, at regular intervals as to her hull, boilers and appliances by Federal officials, unless she is manned by officers who hold Federal licenses, and unless she is navigated according to the rules prescribed by Federal authority. Rivers, bays, lakes and harbors have been improved and made navigable when they were not naturally navigable. New channels have been opened. Old ones have been closed. The authority of the Federal Government over these natural highways has been judicially established in a case in which two sovereign States were parties, *i. e.*, South Carolina *vs.* Georgia, 93 U. S., 4. The Congress has not yet exercised its full power over interstate transportation by land over artificial highways, nor even to the extent to which it has exercised it over transportation by water over natural highways.

The control of the Federal Government over transportation for military purposes is also a necessary incident to the war power. It may transport its armies and its war material by any means it chooses to select. It may provide its own instrumentalities for that purpose, or it may use private or quasi-public instrumentalities. It may use existing highways, or it may construct and operate such highways itself. Nobody ever doubted or questioned the power of the Congress to construct and operate military roads, and it exercised the power several times in the early days of the country.

It is a matter of history that Jefferson Davis, both statesman and soldier as he was, advocated the construction by the United States, as a military necessity, of a railroad connecting the Atlantic and the Pacific Ocean, and the surveys for such a road were made during his incumbency of the office of Secretary of War. The Union Pacific Railroad was the outcome of this plan. The Congress did not construct it itself, but it organized a cor-

poration for that purpose, and gave it enormous grants of land and money to aid in its construction, and, as stated above, on the face of the statute, pitched its authority so to act upon the military power, the commerce power and the postal power.

Transportation being of the very essence of the postal power, the Constitution contains an express and specific grant to the Congress of power "to establish Post Roads." It is the only specific grant in the Constitution over highways.

Under this express grant of power can the Congress itself construct and operate highways for postal purposes?

To the present generation of Americans who have seen the disappearance of all that narrow sect who seemed to regard the Federal Government as an alien enemy, who denied to it the powers appropriate to the accomplishment of its purposes, who particularly denied its power to make internal improvements of any kind, or to acquire lands within the limits of a State even for Federal purposes without the consent of the States, and who denounced as a rank usurpation the decision of the Supreme Court as to the charter of the Second Bank of the United States, and as to the want of power in the States to destroy it by taxation, the answer to this proposition is free from difficulty, and is affirmative.

The views of this extinct sect are well expressed in Mr. Justice Daniel's dissenting opinion in Searight *vs.* Stokes, 3 How., at page 180, who said:

"I hold then that neither Congress nor the Federal Government in the exercise of all or any of its powers or attributes possesses the power to construct roads, nor any other description of what have been called internal improvements, within the limits of the State. That the territory and soil of the several States appertain to them by title paramount to the Constitution, and cannot be taken, save with the exception of those portions thereof which might be ceded for the seat of the Federal Govern-

ment, and for sites permitted to be purchased for forts, arsenals, dock yards, etc. That the power of the Federal Government to acquire, and that of the States to cede to that government portions of their territory, are by the Constitution limited to the instances above adverted to, and that these powers can neither be enlarged nor modified, but in virtue of some new faculty to be imparted by amendments to the Constitution."

They further find full development in great detail in the message of President Monroe of May 4th, 1822, vetoing an act of the Congress imposing tolls for the use of the Cumberland or National Road, he holding that neither under the power to regulate commerce, nor under the post-road power, nor under any other power, could the Congress build or authorize the building of a road in the States; and also in the message of President Polk of August 3d, 1846, vetoing an appropriation of $1,374,450, for the improvement of certain harbors, rivers and lakes, on the ground that the United States had no constitutional power to construct works of internal improvement, or to appropriate money from the treasury for that purpose. Would not the men of today "stare and gasp" if the President should veto the River and Harbor Bill on any such grounds?

The power of the Government on this subject is now judicially settled by the case of South Carolina *vs.* Georgia, cited above, and long before that case was decided, had been settled by the common sense and acquiescence of the whole American people.

The zeal of the anti-internal improvement faction led them to attack even the express power to establish post-offices and post-roads. They maintained that such power was only a power to direct where post-offices should be kept, and to designate or point out what roads shall be mail roads. They denied the power to build a post-office and to take land for that purpose, and to build a post-road and to take land for such purpose. This ancient controversy with the arguments in detail on both sides is

set forth in full in Judge Story's Commentaries on the Constitution from Section 1123 to 1143. He does not directly express his own opinion, but says the "reader must decide for himself on the preponderance of the argument"; but, he calls attention to the fact that the point turns on the interpretation of an express grant of a "new and substantive power unknown before in the national government," and that "here, if ever, the rule of interpretation which requires us to look at the nature of the instrument, and the objects of the power, as a national power, in order to expound its meaning, must come into operation."

In view of the established doctrines set forth in the judicial opinions above referred to, the arguments of the narrow constructionists against the right to construct post-roads have been demolished. It is impossible to maintain that highways may be constructed and established without the consent of the States, and the power of eminent domain be used and granted for that purpose, as a mere incident to the power to regulate commerce, and at the same time to deny that an express grant of a great national power, exclusive in its nature, "to establish post-roads," does not mean what it says, and does not convey the power to build, maintain and operate highways for postal purposes.

The people of the United States, acting through the Congress, which has always repudiated this narrow construction, have answered the "pointing out and designating" theory by acquiring land and building a government post-office building in the principal towns and cities of every State in the Union.

The Congress in every charter they have granted for a railroad or a bridge, or in every authorization to a State corporation to build a bridge, have expressly pitched their right so to act on the post-road power in whole or in part. An investigation of these acts of authorization will show that as a rule the post-road power is the only

one referred to. Although it was made the sole basis of the act legalizing the Wheeling Bridge, after it had been condemned by a decree of the Supreme Court, yet when that act came up for consideration in Pennsylvania *vs.* Wheeling & Belmont Bridge, 18 How., 421, the court declined to enter into a discussion of the post-road power, on the ground that if that power was insufficient to legalize the bridge the interstate commerce power was sufficient.

But we are not without judicial determination of this question. The whole subject was discussed in a luminous and exhaustive manner by the Supreme Court of Kentucky in the case of Dickey *vs.* Turnpike Company, 7 Dana (37 Ky. Rep.), 113, which involved the liability of a U. S. mail carrier and contractor to pay tolls for carrying the mails over a State turnpike road. This opinion, rendered by Chief Justice Robertson, and concurred in by Thomas Marshall, two of the greatest lawyers ever produced by that State, is too long to quote, but some extracts from it are necessary to the discussion. After pointing out that the Congress of the Confederation had only power to establish post-offices between the States, and no power whatever to establish post-roads, and that it had, under its post-office power, used and designated the State roads as postal routes, and that the new and larger grant of power in the Constitution, being one made to a national government for national purposes, must be given some other interpretation than that of merely designating as post-roads State roads belonging to, maintained by, and absolutely under the control of the States, a power which the National Government would have under the post-office power alone, the Court said:

"For we are clearly of the opinion that both the objects contemplated by the grant of the new power to establish post-roads, and the plain constructive import of the grant itself, as made in the Constitution, show that

this comprehensive and express power was given, not for authorizing the mere designation and use of State Roads as post-roads, but for enablIng the general government to make, repair, and keep open such roads in every State, as might under any circumstances be necessary for the most effectual and satisfactory fulfillment of the great national trust of transporting the mails safely, certainly, speedily and punctually, without any necessary dependence on the policy, or will or purse of any one of the States; and these were in our opinion the only ends for which that express power was given."

Answering the arguments as to the meaning of the word "establish," the Court said (p. 125):

"Whether we consider the popular use of the word 'establish' or the definition of it by the most approved lexicographers, or the admitted import of it, in the preamble and in the fourth clause of the eighth section of the federal constitution, it must be understood to mean, not merely to designate, but to create, erect, build, prepare, fix permanently. Thus, to establish a character, to establish oneself in business, to establish a school, manufactory, or government—all common and appropriate phrases—is not to assume or adopt some pre-existing character, or business, or school, or manufactory, or government. To establish, in each of those uses of the phrase, clearly expresses the idea of creating, preparing, founding, or building up. In the same sense, too, it is used and understood in the Bible; thus it is said 'The 'Lord by wisdom hath founded the earth; by understand-'ing hath established (prepared) the heavens.' Proverbs, iii, 19.

"Just so, also, is it used and understood in the Federal Constitution. Thus we find in the preamble these words, 'establish justice'; 'establish this Constitution'; and in the fourth clause of the eighth article, power given to Congress 'to establish an uniform rule of naturalization, 'and uniform laws on the subject of bankruptcies 'throughout the United States.'

"Thus we might present almost endless illustrations of the fact that the popular and philological, sacred, and profane, oracular and political import of 'establish,' is not to designate, but 'to found, prepare, make, institute and confirm.'

"It appears to us, therefore, that 'to establish post-offices and post-roads' means *ex vi termini*, not only the designation and adoption of an existing house and road for a post-office and a post-road, but also, more comprehensively, the renting or building of a house, and the construction and the reparation of a road, and the appropriation of money for any of those national purposes, whenever any of them shall be deemed useful. And the unquestionable fact that 'to establish' imports to make or create, in every other place where it is used in the Constitution, and especially in the fourth clause of the eighth section, tends persuasively, if not conclusively, to prove that the same words used without any qualification directly afterwards in another clause of the same Constitution, were understood in the same sense in which they were employed in the antecedent clause, as well as in the preamble. We can perceive no ground for discrimination. The subject matter of the two clauses is not of a nature so essentially different as to authorize a more comprehensive interpretation of the power in the one clause, and a more restrictive construction of it in the other; and the object was the same in both; that is, to place the United States above dependence on any one of the States, so far as naturalization, and bankruptcy, and post-offices, and post-roads might be concerned as national objects."

It may further be noted that Article VII of the Constitution provides that "the ratification of the conventions of nine States shall be sufficient for the *establishment* of this Constitution between the States so ratifying the same," and that Article III of that instrument vests judicial power in the Supreme Court and in such inferior courts as "the Congress may from time to time ordain and *establish*." Indeed, the use of the word "establish" in our constitutional legislation in its broad sense of "creating or making" antedates the Constitution itself. Thus it is four times used in the Articles of Confederation, once in Art. 6 speaking of such regulations of letters of marque and reprisals "as shall be established by the United States, etc.," and three times in Art. 9, granting the power "of *establishing* rules as to captures on land and

water," "of *establishing* courts of appeal in cases of capture," and "of *establishing* and regulating post-offices from one State to another." Again, the proceedings of the convention of 1787 which framed the Constitution give many instances of the use of the word "establish," going to show that when used in a grant of power it was the broadest and most comprehensive word in the legislative vocabulary: thus, propositions were made and voted down to grant to the Federal Government power "to *establish* a university," "to *establish* seminaries for the promotion of literature and the arts and sciences," "to *establish* public institutions, rewards and immunities for the promotion of agriculture, etc."

And again the Court said in the Dickey case:

"All the powers over post-offices and post-roads which the States ever possessed have been wisely transferred as one indivisible national power to the general government, which now possesses of course all the authority in that respect, which all the people of all the States, either aggregately or in separate State Sovereignties could possess and delegate. Under the plenary power to establish post-roads Congress must, therefore, have as much right to make and repair roads as the States ever had for the purpose of having suitable post-roads. The consent of a State is not indispensable; for if the Constitution gave the power, it exists without the concurrence of any State; and if the Constitution did not delegate the power to Congress the consent of a State or of all the States could not give it without an amendment of that national charter, from which alone Congress derives or can derive legislative authority."

This quotation expresses the same doctrine as that declared by the U. S. Supreme Court in *Ex parte* Rapier, 143 U. S., 134, where the power of the Congress to exclude lotteries from the mails was affirmed on the ground that:

"The States before the Union was formed could establish post-offices and post-roads, and in so doing could

bring into play the police power in the protection of their citizens from the use of the means so provided for purposes supposed to exert a demoralizing influence upon the people. When the power to establish post-offices and post-roads was surrendered to the Congress, it was as a complete power, and the grant carried with it the right to exercise all the powers which made that power effective."

In Pensacola Telegraph Co. vs. Western Union Telegraph Co., 96 U. S., 1, where the Supreme Court of the United States declared a State statute giving an exclusive right to a State Telegraph Company within certain of its territory void as against a foreign corporation acting under a federal statute giving all companies complying with its terms the right to erect their poles and string their wires along any authorized military or post-road, the Court said:

"Post-offices and post-roads are established to facilitate the transmission of intelligence. Both commerce and the postal service are placed within the power of Congress because, being national in their operation, they should be under the protecting care of the National Government. The powers thus granted are not confined to the instrumentalities of commerce or of the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate at all times and under all circumstances."

The above language was quoted with approval by the Court in the Lottery Case, 188 U. S., p. 350.

The general opinion of the commentators on the Con-

stitution is that under the post-road power the Congress may construct such roads.

Rawle on the Constitution, p. 103.
Hare's American Const. Law, Lecture XV.
Sutherland, Notes on U. S. Const., 176.

Even my beloved and devoted old friend, the Honorable John Randolph Tucker, the strictest of the Strict Constructionists, admits this proposition (Tucker on the Constitution, Section 276), but apparently seeks to limit the power to cases where there are no State roads, and says that to construct a post-road for any other than postal purposes would be a fraud on the Constitution. Just so it was said that the United States Bank was a fraud on the Constitution because it was given general banking powers, and the organization of the national banks and of the Pacific Railroads may with just as good reason be similarly denounced.

I, therefore, maintain that, at this date in the history of the Constitution, the proposition is impregnable that the Federal Government has the full and complete power to establish all over this country, and from each locality in it to every other locality in it, a system of post-roads; that it may locate such roads and condemn property therefor in its discretion, subject only to the obligation of making compensation for property taken or damaged, and to the obligation of not interfering with the instrumentalities of the State governments; that these roads may be of any sort or kind the Congress may select, dirt roads, turnpikes, or railroads, moved by steam, electricity or any other power; that it may confine the use of these roads strictly to its own purposes, postal, governmental and military, or it may permit their use for other purposes; that it may permit these uses for other purposes free of tolls and charges, or it may fix for such uses any tolls or charges it may think proper.

There is, I submit, no just ground for the doubt, ex-

pressed by Mr. Rawle, as to the constitutional power in the Federal Government to charge tolls for the use of a post-road, in case it should permit its use for other purposes. The sovereign and unlimited power to build, operate and maintain post-roads necessarily implies the right to permit their use and to charge tolls for such use, in order to lighten the burden on the general public of building and maintaining such roads and to distribute it among those who are most benefited. Such is the common practice of all governments. In order to facilitate the construction of the Panama Canal, the Government now owns and operates a line of vessels from New York to Colon and carries its own officers and materials, and also freight and passengers for hire. Is this unconstitutional?

If the Government should under the interstate commerce power construct an interstate highway, could it not charge tolls for the use of such highways? What possible objection could be urged against this right? The States have the right to improve the natural highways within their borders and to charge tolls for the use of the facilities furnished. The Federal Government having the supereminent right to improve such highways, and, as shown above in the Monongahela Navigation Company case, to expropriate franchises and works authorized by the States in such streams, why can it not charge tolls for the facilities furnished by it? That it has not heretofore made any such charges is due to the wealth and generosity of the Government, and not to any want of power to make them.

If these premises are correct, then it follows, on the principles above shown to be settled beyond controversy, that the Congress may in its discretion organize corporations by general or by special act to aid, assist and facilitate the execution of this express power. Such national post-road corporations would be like the Second Bank of the United States and the existing national

banks, as described in the language of the Supreme Court in Davis *vs.* Elmira Savings Bank, 161 U. S., 283: "Instrumentalities of the Federal Government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States."

If it should be claimed that these corporations could be authorized only to construct and maintain these national post roads, and to carry only the mails, property, and officials of the United States, and that they could not be authorized to deal with individuals in the transportation of persons and property, the answer is twofold: First, that having itself the right to permit the use of such roads and to charge tolls therefor in the event that it owned and operated them, it can transfer such right to its own agents and instrumentalities; Second, that just as the power to deal in money, notes and bills of exchange with individuals for its own profit all over the United States was essential in the opinion of the Congress and of the Supreme Court of the United States, to the proper, efficient and beneficial performance of the duties and functions of the Bank of the United States, as the fiscal agent of the Government, just so the power to deal in transportation must be held to be essential to the proper, efficient and beneficial operation of national post-road corporations. The unchallengeable reasoning of Chief Justice Marshall in Osborn *vs.* U. S. Bank settles this proposition. That reasoning is too closely knitted together to be severed and too long to be quoted here. No valid distinction can be drawn between the vital necessity of the right to trade in money to a fiscal instrumentality of the Government, and the vital necessity of the right to trade in transportation to a transportation instrumentality of the Government. If a bank is created to operate as the fiscal agent of the Government and is permitted to have but one customer, the Government itself, it is manifest that it would be lame and impotent for the purposes of its or-

ganization, unless that one customer should submit to the inconveniences due to the restrictive sphere of its agents' operations and pay such an enormous price for the services performed for it, as to make the burden of supporting the bank fall entirely on its shoulders. So, if a post-road corporation is created to operate as a postal transportation agent of the Government, and is permitted to have but one customer, the Government itself, the cost of transportation to the Government would be so great and possibly the extent, celerity and efficiency of the service so defective, as to defeat the object for which the agency was created. The Federal Government has and must have the power to carry out to a perfect consummation all the great exclusive, express powers granted to it by the Constitution for national purposes. In regard at least to those exclusive, express powers, even the strictest constructionist concedes that it is undoubtedly sovereign, undoubtedly supereminent, and expressly authorized in the Constitution to make all laws necessary and proper to carry them into execution. What is necessary and proper for that purpose is left to the discretion of the Congress. There never has been, and, in my opinion, there never will be any departure from the rule of construction laid down by the great Chief Justice in McCulloch *vs.* Maryland, who said:

"The sound construction of the Constitution must allow to the National Legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution are constitutional."

The power "to establish post-offices and post-roads" is a broad, unlimited and unrestricted grant. It is con-

fined only by those limitations in the Constitution which apply to all the granted powers of the Government.

The powers contained in this grant are fundamentally different from those vested in the Continental Congress by the Articles of Confederation. The post-office power under the Confederation was strictly an interstate power, an exclusive power "of establishing and regulating post-offices from one State to another throughout all the United States." Arts. of Confederation, Art. 9. To each State was left the right to regulate its own internal postal system, with its details of post-offices, post-roads, postal transportation and postal charges. The genesis of the grant as it now stands appears in the proceedings of the Convention of 1787. In Pinckney's proposed draft of a Constitution, which, together with all the general resolutions, presented and not considered, and presented and adopted, was referred to the Committee of Five, there were two distinct clauses, one granting power "to establish post-offices," and one granting power "to establish Post and Military Roads." In the draft of the Constitution reported by the Committee of Five on Aug. 6th only the grant "to establish post-offices" was retained. On Aug. 16th the words "and post-roads" were added on motion of Elbridge Gerry. There appears to have been no debate on this addition (at least none is reported by Madison), though it was carried by only six States to five. Elliot's Debates, Vol. 1, p. 245; The Madison Papers, 1343.

At a later date, Sept. 14th, after the report of the Committee on Style had been presented, Benjamin Franklin moved to add after the words "post-roads" a power "to provide for cutting canals where deemed necessary." This motion was seconded by James Wilson. Madison suggested an enlargement of the motion into a power "to grant charters of incorporation where the interest of the United States might require, and the legislative provisions of individual States may be incompetent." In

support of this amendment he said: "His primary object was, however, to secure an easy communication between the States, which the free intercourse now to be opened seem to call for. The political obstacle being removed, a removal of the natural ones as far as possible ought to follow." Franklin's motion being modified at the suggestion of Madison and Col. Mason so as to make it cover a power to grant letters of incorporation of canals alone, it was lost. Elliot's Debates, Vol. 1, p. 310; The Madison Papers, pp. 1576-7. I submit that the substance of Franklin's amendment, the clause in the Constitution of which it was to make a part and to which it was supposed to be germane, and the discussion had on it, show clearly that the framers of the Constitution understood that the powers "to establish post-roads" meant the power to construct and operate them.

The only mention made of the post-road power in the *Federalist* is contained in No. 42, by Madison, who says:

"The power of establishing post-roads must in every view be a harmless power, and may perhaps by judicious management become productive of great public conveniency. Nothing which tends to facilitate intercourse between the States can be deemed unworthy of the public care."

How could such a power be used so as to be "productive of great public conveniency," and how could it tend to "facilitate intercourse between the States" if it was exhausted by designating the roads, made and maintained by the States, or their grantees, as post-roads on which mail carriers might transport the mails, and did not extend, in the fullest measure, to the construction and maintenance of postal highways by the Federal Government itself, or its grantees.

The grant as it stands today in the Constitution is now conceded to be exclusive in its nature. No postal power whatever remains in any of the States. As stated by the Supreme Court of Kentucky in the Dickey case, *supra*,

and by the Supreme Court of the United States in the Rapier case, *supra*, the grant was a complete grant of all the power on that subject theretofore resident in the States, inclusive even of the police power, to the extent necessary to make the grant effective.

It is a grant for national purposes, and, as said by Judge Story, must be treated from the national point of view. That it has not been heretofore exercised to its full extent is no argument against its scope or its national character. If the people, in the Congress assembled, believe it to be wise to use this broad grant to establish a government postal bank, a government postal telegraph, or a government postal express by land or water or both, and to permit the people, even as Congressmen, under the franking privilege, have been known to do under the existing system, to send their pianos, household furniture and laundry through the mails, they have, I submit, the undoubted constitutional power so to do.

They have already set up the postal money-order system, which the strict constructionists might say is void because essentially a domestic exchange business. They have already laid the beginnings of the parcels post, by authorizing packages of merchandise, not weighing over four pounds, to be carried as mail matter, which the strict constructionist might also say is void because essentially a freight-carrying business.

Having all these powers, and discretion as to how they shall be exercised, and having the undoubted power to create corporations as instrumentalities to facilitate the execution of its powers, it appears to me that the conclusion is irresistible that the Federal Government has the right to establish national post-road corporations and to give them power to deal in the transportation of persons and things as a convenient, appropriate, efficient and hence necessary and proper means to accomplish the purpose for which their Governmental instrumentality is established.

This power to deal in transportation would not be derived from, nor be based upon, nor have any connection with, the interstate-commerce power of the Constitution, and therefore would not be bound by the limitations on that power.

The limited power of the Congress over interstate transportation, as the vehicle and instrument of interstate commerce, would not prevent the exercise of power over transportation as auxiliary to the express power to establish post-offices and post-roads. The principle that "power over a particular subject may be exercised as auxiliary to an express power, though there is another express power relating to the same subject, less comprehensive" was laid down in U. S. *vs.* Marigold, 9 How., 560, and was formulated by the Court as above quoted in the Legal Tender Cases, 12 Wall., 544. (See also Shollenberger *vs.* Brinton, 52 Penn. St., p. 64.)

The claim that these national post-road corporations, with the powers suggested, would infringe upon the reserved rights of the States is without foundation. If the broad, exclusive, national grant is in the Constitution, how can there be any question of infringement on the reserved powers of the States? The reserved powers are those not granted at all. There is no just reason why State highways, and State corporations to build and operate State highways, and Federal postal highways, and Federal corporations to build and operate Federal postal highways, could not co-exist in the same territory just as State banks and national banks exist, side by side, in the same cities and towns, competing with each other for the banking business of the people, interchanging business with each other, and acting together in matters pertaining to their mutual interests, as, for instance, in clearing-house associations. Of course, the power of the States to control these national post-road corporations would be limited, but the same limitations exist on the power of the State to control the national banks, or

any other instrumentality of the Federal Government. These national post-road corporations may have many advantages over State transportation companies, just as the national banks may have many advantages over State banks, but these advantages are not only not an argument against their existence, *but the very strongest argument for their creation.* The superior advantages of the national banks over the existing State banks were conceived to be so great when the national banking system was created that provision was made in the National Banking Act whereby all State banks could transmute themselves into national banks. In Casey *vs.* Galli, 94th U. S., 673, it was held that no consent of the State, under whose laws a banking company was organized, was necessary to enable it to change its charter from a State to a Federal charter, because "it was as competent for Congress to authorize the transmutation as to create such institutions originally." On the same principle it would be competent for the Congress to authorize all State transportation companies, engaged in carrying the United States mails on post routes, adopted and designated as such by the Congress, to surrender their State charters and become national post-road corporations. Such change of corporate existence would have to be entirely voluntary, and could not, of course, be compelled by the Congress, but a strong compelling power would lie in the Congress by a provision that none but a Federal post-road corporation should carry the mails.

But, it is excitedly exclaimed, by those whose amusement and profit it is, in some of the States, to bait the transportation companies like bears, and, under the pretense of reasonable regulation and taxation, practically to confiscate their property and franchises, if you give the State transportation companies any such opportunity they will all grasp it, and the States will lose control of all the existing highways now owned and controlled by such State corporations! What if they do? Is their

power affected to build or to authorize the building of others? Are their just powers and privileges in any way injured or diminished? Did not such an exodus from State authority take place of State Banks under the National Banking law? Has the general welfare of the people of any State or of the aggregate people of the Nation been thereby injured? From my point of view this exodus of State transportation companies from State authority and their incorporation under Federal authority is the very point to be accomplished by the establishment of the national post-road system.

The transportation problem in these United States is one which most intimately affects the convenience, the comfort, the health and the prosperity of all the people. The artificial highways of the nation have long ago exceeded in number and in importance the natural highways which have already passed entirely under Federal control. These artificial highways are nearly all linked together in one great connected system like the arteries and veins of the human body, and ought to function in some similar way. They are now subject to the discordant control and regulation of forty-five different independent legislative sovereigns, some conservative, some viciously radical. In some of these it is claimed that the transportation corporations dominate the legislatures, and are too strong for the people to handle. In others it is well known that the transportation companies are worse than pariahs, and are treated as such. The American people have fourteen and a half billions of capital invested in these great corporations. Their securities form the main investment of educational institutions, insurance companies, savings banks, trust companies, trust estates and thousands of persons whose fortunes are involved in the integrity of these securities. The notion that the bulk of these securities are owned and controlled by half a dozen criminal millionaires, is a falsehood

taught and propagated by yellow journalism, the strongest ally of anarchy and socialism.

Wolfe's Investment Directory of Insurance Companies for 1906 shows that the 339 insurance companies covered by that directory alone, held in June of that year $1,189,677,000 of the par value of railroad stocks and bonds. The last report of the New York Life Insurance Company shows an investment of $271,000,000 in such securities. The statistics for other institutions are not available to me at this time, if at all. An educational institution of which I am an administrator has more than $2,000,000 so invested. A high official of the Atchison system has assured me that their stock records show that the average holdings of their preferred stock is eighty shares, and of their common stock one hundred and fifty shares. The records of the other regular dividend payers will doubtless show similar results. I suggest that complete statistics on this subject might be gathered by the Census Department, and that their dissemination might tend to produce conservatism is quarters where it is needed.

Great abuses have arisen in the issuance and manipulation of the stocks and bonds of these great transportation companies. Other great abuses have arisen in the treatment of the public by these companies; and other abuses equally great have arisen in the treatment of these companies by the public.

The American people want all these abuses stopped, and by some means short of Government ownership, which some of them favor, but which most of them justly repel. I believe, and I think most of them believe, that the united strength of the whole nation is alone competent to effect the desired results, and therefore that any plan that can be devised, consistent with the Constitution of our country as interpreted by its lawful expounders, which will bring all transportation by land and water under the strong arm and the vigilant eye of the Federal Government, is a "consummation devoutly to be wished."

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In the Supreme Court of the United States.

OCTOBER TERM, 1921.

THE STATE OF NEW YORK AND Charles D. Newton, Personally and as Attorney General of the State of New York, appellants,
v.
THE UNITED STATES, INTERSTATE COMMERCE COMMISSION, et al., appellees.

No. 283. In Equity.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

STATEMENT.

The subject matter of this suit is an order of the Interstate Commerce Commission, dated November 13, 1920, requiring common carriers operating lines of railway in the State of New York to increase certain of their rates, fares and charges for intrastate transportation services performed by them within that State. The body of the order, to the extent it appears to be necessary to reproduce same here, reads as follows:

> This case being a proceeding instituted by the Commission upon petition filed, and having been duly heard and submitted by the parties, and full investigation of the matters

and things involved having been had, and the Commission, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the common carriers who are parties to this proceeding, namely, (names of carriers shown in order omitted here) according as they respectively participate in the transportation, be, and they are hereby, notified and required to cease and desist from practicing the undue prejudice, undue preference and advantage, and unjust discrimination, found in said report to exist, and to establish, put in force, and maintain passenger fares and baggage charges for the transportation of passengers and their baggage in intrastate commerce within the State of New York which shall exceed the fares and charges of the carriers now in force and applicable to such transportation in amounts corresponding to the increases heretofore made by the carriers, now in effect, under *Ex parte 74*, referred to in said report, in said carriers' passenger fares and baggage charges for the transportation of passengers and their baggage in interstate commerce within the State of New York and between points in the State of New York and points in other States;

It is further ordered, That said carriers, according as they respectively participate in the transportation, be, and they are hereby, notified and required to cease and desist from

practicing the undue prejudice, undue preference and advantage, and unjust discrimination found in said report to exist, and to establish, put in force, and maintain charges for space in sleeping cars and in parlor cars occupied by passengers traveling in intrastate commerce within the State of New York which shall exceed the charges of the carriers now in force and applicable to the occupancy of such space in said transportation in amounts corresponding to the increases heretofore made by the carriers, under an order made by the Commission as aforesaid in *Ex parte 74*, in said carriers' charges for the occupancy of like space in sleeping cars and in parlor cars by passengers traveling in interstate commerce within the State of New York and between points in the State of New York and points in other States;

It is further ordered, That said carriers, according as they respectively participate in the transportation, be, and they are hereby notified and required to cease and desist from practicing the undue prejudice, undue preference and advantage, and unjust discrimination found in said report to exist, and to establish, put in force, and maintain rates for the transportation of milk and cream in intrastate commerce within the State of New York which shall exceed the rates of the carriers now in force and applicable to such transportation in amounts corresponding to the increases heretofore made by the carriers, under *Ex parte 74*, in said carriers' rates for the transportation of milk and

cream in interstate commerce within the State of New York and between points in the State of New York and points in other States;

It is further ordered, That nothing contained herein shall be construed as either authorizing or requiring said carriers, or any of them, to change in any manner or to any extent the commutation fares, or any of the commutation fares, or charges upon excess baggage carried in connection with any of the commutation fares, of said carriers now in force and applicable to the transportation of passengers or to other transportation in intrastate commerce within the State of New York.

It is further ordered, That this order shall become effective on or before December 18, 1920, upon notice to this Commission and to the general public by not less than five days' filing and posting in the manner prescribed in section 6 of the interstate commerce act and remain in force until the further order of the Commission in the premises;

And it is further ordered, That a copy of this order be served upon each of the common carriers who are parties to said proceeding.

In the report of the Commission, upon which the order is based, appearances are shown as follows: *Charles D. Newton* and *Edward G. Griffin* for the State of New York; *Ledyard P. Hale* and *Joseph A. Kellogg* for New York State Public Service Commission, second district; *Terence Farley* for New York State Public Service Commission, first district; *John Holley Clark, jr.*, for Chamber of Commerce of the Borough of Queens; *John Adikes* for Jamaica Board of Trade.

In said report, the Commission, among other things, said:

> In pursuance of our findings in *Ex parte 74, Increased Rates, 1920*, 58 I. C. C., 220, we authorized within a region that includes the State of New York an increase of 40 per cent in the interstate freight rates; 20 per cent in the interstate passenger fares, baggage charges, and rates on milk and cream; and also a surcharge amounting to 50 per cent of the charge for space in sleeping and parlor cars, to accrue to the rail carriers.
>
> Thereupon the steam railroad companies serving the State of New York made formal application to the Public Service Commission of the State of New York, second district, for permission to file, effective on five days' notice, tariff supplements providing increases in the rates, fares, and charges applicable to intrastate traffic in the State of New York corresponding with those authorized in our report. So far as the application related to rates and charges for the transportation of freight except milk it was granted by the Public Service Commission, by an order entered August 19, 1920, and the increases became effective August 26, 1920, contemporaneously with the increases in interstate rates. But so far as it related to passenger fares, sleeping-car and parlor-car fares, baggage charges, and rates on milk and cream, the application was denied by the Public Service Commission. Thereafter the principal steam railroads serving the State of New York filed with us a petition for relief

in accordance with the provisions of section 13 of the interstate commerce act. A hearing upon the petition has been held, and the views of parties in interest have been presented to us on brief and by oral argument. (Rec. 183–184.)

It has not happened heretofore that we have had occasion to make such an extensive exercise of our authority as is now contemplated, and we could not be moved to do so save by the most cogent reasons. Such reasons have been supplied by the situation in which the transportation interests of the country were placed and the action taken by Congress to relieve that situation. (Rec. 186.)

The record shows that the refusal of the State of New York to permit the carriers to increase the rates and fares here in controversy to the extent approved by us is costing the railroads between $11,000,000 and $12,000,000 annually. In other words, the annual earnings of the interstate carriers operating in New York are now between $11,000,000 and $12,000,000 less than they would be if the general level of rates and fares approved by us had become effective on intrastate traffic; and to that extent the declared purpose of Congress is defeated by a preferential basis of rates and fares maintained by authority of the State of New York.

This proceeding presents a practical question which we have endeavored to deal with in a practical way. The needs of these interstate carriers for revenue to enable them to provide adequate transportation service and facilities

are immediate and, in the interest of the public, can not be permitted to await the consideration in detail of individual fares, charges, and rates. The record shows that the respondent carriers perform the services here in question under substantially similar circumstances and conditions, whether in respect of interstate or intrastate transportation; and that the lower basis of intrastate fares, charges, and rates results in undue prejudice against interstate passengers and shippers and unjust discrimination against interstate commerce. The present record warrants the findings hereinafter made. Those findings are without prejudice to the right of the authorities of the State of New York or of any other interested party, to apply in the proper manner for a modification of our findings and order as to any fares, charges, or rates on the ground that the latter are not related to the interstate fares, charges, or rates in such a way as to contravene the provisions of the interstate commerce act. (Rec. 190–191.)

The record contains comparatively little evidence on the subject of commutation fares, but so far as it goes it discloses facts in the presence of which we can not presume that the existing rate structure is just and reasonable in its established relationships and that it should be adopted as the basis upon which a general advance should be authorized, as in the foregoing particulars. We shall therefore reserve for future consideration this branch of the case, and as to it we do not now

make any finding or enter any order, but we shall keep the case open for further investigation, limited to the subject of commutation fares and commutation baggage charges in the State of New York as to the question whether they cause any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand, and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce.

FINDINGS.

Subject to the above reservation in the matter of commutation fares and commutation baggage charges, we are of the opinion and find that the increases made by the carriers under *Ex parte 74*, relating to passenger fares and baggage charges, and now in effect, result in reasonable passenger fares and baggage charges for interstate transportation within the territory involved in this proceeding, and that the failure of the carriers within the State of New York to increase the standard intrastate fares and charges correspondingly has resulted in the past and will result in the future: In intrastate fares and charges lower than the corresponding interstate fares and charges; in undue prejudice to persons traveling in interstate commerce within the State of New York and between points in the State of New York and points in other States; in undue preference and advantage to persons traveling

intrastate in New York, and in unjust discrimination against interstate commerce.

We further find that said undue prejudice and unjust discrimination should be removed by making increases in said intrastate passenger fares and baggage charges which shall correspond with the increases heretofore made as aforesaid in interstate passenger fares and baggage charges.

We further find that the increases made by the carriers under *Ex parte 74*, relating to space occupied by passengers in sleeping and parlor cars, result in reasonable charges for the occupancy of such space by passengers traveling in interstate commerce in the territory involved in this proceeding, and that the failure of the carriers within the State of New York to increase correspondingly the charges for like space for passengers traveling in intrastate commerce has resulted in the past and will result in the future: In intrastate charges lower than the corresponding interstate charges; in undue prejudice to persons traveling in interstate commerce within the State of New York and between points in the State of New York and points in other States; in undue preference and advantage to persons traveling intrastate in New York, and in unjust discrimination against interstate commerce.

We further find that said undue prejudice and unjust discrimination should be removed by making increases in said intrastate charges which shall correspond with the increases heretofore made as aforesaid in interstate charges.

We further find that the increases made by the carriers under *Ex parte 74*, relating to rates on milk and cream, and now in effect, result in reasonable rates on milk and cream for interstate transportation within the territory involved in this proceeding, and that the failure of the carriers within the State of New York to increase the intrastate rates on milk and cream correspondingly has resulted in the past and will result in the future: In intrastate rates lower than the corresponding interstate rates; in undue prejudice to shippers of milk and cream in interstate commerce within the State of New York and between points in the State of New York and points in other States; in undue preference and advantage to shippers of milk and cream in intrastate commerce in New York, and in unjust discrimination against interstate commerce.

We further find that said undue prejudice and unjust discrimination should be removed by making increases in said intrastate rates on milk and cream which shall correspond with the increases heretofore made as aforesaid in the rates on milk and cream shipped in interstate commerce.

We further find that, whether the aforesaid passenger fares, baggage charges, surcharges, or rates on milk and cream pertain to transportation in interstate commerce or to transportation in intrastate commerce, the transportation services, in each instance, are performed by the carriers under substantially similar circumstances and conditions. (Rec. 196–199.)

In making the aforesaid report, findings and order, the Commission acted under authority conferred, and in response to duties imposed upon it by paragraphs (3) and (4) of section 13 and paragraphs (2) and (3) of section 15a, of the interstate commerce act, which read:

> SEC. 13 (3). Whenever in any investigation under the provisions of this act, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this act with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also author-

ized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this act.

(4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

SEC. 15a (2). In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient

and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided*, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

(3) The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission. In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation: *Provided*, That during the two years beginning March 1, 1920, the Commission shall take as such fair return a sum equal to 5½ per centum of such aggregate value, but may, in its discretion, add thereto a sum not exceeding one-half of 1 per centum of such aggregate value to make provision in whole or in part for improvements, betterments or equipment, which, according to the accounting system prescribed by the Commission, are chargeable to capital account.

By orders dated, respectively, March 29, 1921, and April 19, 1921, the Commission amended said order of November 13, 1920. The amendments so made are sufficiently shown by two paragraphs of the amendatory orders, which read:

> *It is further ordered*, That nothing in this order shall be construed as requiring any common carrier to establish, put in force or maintain any rate, fare or charge for the transportation of passengers or property in intrastate commerce which is greater than its corresponding rate, fare or charge applicable to the transportation of passengers or property in interstate commerce from, to or at the same points in effect on said 13th day of November, 1920, or greater than its corresponding rate, fare or charge contemporaneously in effect and applicable to the transportation of passengers or property in interstate commerce.
>
> *It is further ordered*, That nothing in this order shall be construed as prohibiting any carrier, party to this proceeding, from increasing any rate, fare or charge for the transportation of passengers or property in intrastate commerce, prescribed in said order of November 13, 1920, to the level of its corresponding rate, fare or charge contemporaneously in effect and applicable to the transportation of passengers or property in interstate commerce, provided such increase is made pursuant to the laws of the State of New York and with the approval of the authorities of said State.

After hearing, upon appellants' motion for an interlocutory injunction against the United States and the Interstate Commerce Commission, and upon motions of the latter two parties that the bill of complaint be dismissed, the District Court denied the injunction and granted the motion to dismiss, whereupon the appellants took the case to this court by appeal.

The appellants' assignments of error are twenty-one in number, but we think the substance of the assignments may be summarized as follows:

In making said order of November 13, 1920, the Commission acted arbitrarily.

In making said order of November 13 the Commission acted beyond the authority conferred upon it by the interstate commerce act as amended by the transportation act, 1920.

The provisions of law involved are in conflict with the Constitution of the United States.

In this brief we will endeavor to support, in each instance, the opposite of said contentions.

60355—21—2

ARGUMENT.

I.

In making the order here involved the Commission did not act arbitrarily.

As shown by appellees' exhibit (Rec. 416) the record before the Commission in said *Ex parte 74* is a part of the record upon which is based the order involved in this case, and concerning the circumstances under which the former record was made the Commission said:

> In this proceeding the carriers by railroad subject to our jurisdiction seek authority, pursuant to the provisions of section 15a of the interstate commerce act, to increase their freight revenues to a basis that will enable them to earn an aggregate annual net railway operating income equal, as nearly as may be, to 6 per cent upon the aggregate value of the railway property of such carriers held for and used in the service of transportation. The applications, which were filed in the latter part of April and the early part of May, 1920, were made at our suggestion to assist us in complying with the provisions of that section. Similar applications were filed on the part of certain carriers by water. Hearings were held in Washington in May, June, and July, 1920, and the case was submitted upon briefs and oral argument on July 6, 1920. In accordance with the provisions of paragraph 3 of section 13 of the interstate commerce act we invited the State commissions to cooperate with us in this proceeding, and there were appointed

> three representatives of those commissions, Hon. William D. B. Ainey, chairman of the Public Service Commission of Pennsylvania; Hon. Royal C. Dunn, of the Railroad Commission of Florida; and Hon. Jno. A. Guiher, of the Railroad Commission of Iowa, who sat with us throughout the hearings and oral argument and joined with us in conferences antecedent to our determination of the matters in issue. (Rec. 314–315.)

After the Commission had issued its report and order in *Ex parte 74*, authorizing the steam carriers, operating railroads in the State of New York in interstate commerce and also in intrastate commerce, to make certain increases in their rates, fares and charges for interstate transportation, the State of New York by its Public Service Commission for the second district of that State, as shown by appellants' "Paper 1" and "Paper 2" (Rec. 28–35), denied the carriers' application for authority to increase correspondingly the rates, fares and charges covered by the order which is the subject-matter of this suit, whereupon the carriers filed with the Commission a petition for relief in accordance with the provisions of section 13 of the interstate commerce act. Thereafter, the Commission instituted an investigation, and held hearings in which the State of New York and its two Public Service Commissions were represented as above shown, and as a result of which it made the order whose validity is under consideration here.

It will be seen that the Commission acted in exact accordance with the authority conferred and the

duties imposed upon it by paragraphs (3) and (4) of said section 13, and under these circumstances it is difficult to perceive how appellants can reasonably expect the court to uphold the contention contained in their third assignment of error to the effect that the report, findings and order of the Commission "were made in defiance and disregard of the procedure and requirements of the statutes of the United States and without the full and fair hearing provided for therein."

In their second assignment of error, appellants contend that there were no facts before the Commission which justify said report, findings and order. If by this appellants mean to contend that the findings of fact upon which the Commission's order is based are not supported by substantial evidence, there are at least two reasons why the contention can not be sustained. It is admitted that in New York the carriers' interstate fares are on a basis of 3.6 cents per mile, while, generally speaking, the carriers' intrastate fares are on a basis of 3 cents per mile, and the Commission's finding that this disparity causes a loss of from $11,000,000 to $12,000,000 a year to the carriers is not denied. Also, that the transportation services to which the fares apply, regardless of whether the traffic transported is interstate or intrastate, are performed by the carriers in each instance under substantially similar circumstances and conditions, is shown by the record from which we quote as follows:

Q. Is or is not the service rendered by the different roads between the different common points or between New York and points in the State of New York, a similar service or is it otherwise?—A. Quite similar.

Q. Will you say in what respects it is similar?—A. As to approximate running time, character of equipment, dining car service.

Q. And as to number of trains?—A. Yes; there is, speaking directly of the service, between New York and Buffalo—there are more trains via the New York Central than via the other lines. A very large percentage of the business, however, is done on night trains, and the service both as to the character of equipment and running time is approximately the same.

Q. Now, take the service over the New York Central Railroad between New York and Buffalo and other intrastate points, and New York and Chicago, Cleveland and other interstate points, will you say in what respect the service is similar or different, as to service between intrastate points and interstate points?—A. There is no difference in the character of the service between intrastate or the interstate points.

Q. As to equipment or as to time?—A. No material difference, generally speaking. Of course, in the case of the service between New York and Chicago, we have the Twentieth Century Limited.

Q. But that is a particular Chicago train?—A. That is a particular Chicago train.

Q. But as to other trains, outside of the Century, passengers are taken upon those trains, irrespective of whether they are interstate or intrastate passengers, are they not?—A. Yes, sir.

Q. And persons going from New York to Cleveland will travel upon the same train, with persons going from New York to Buffalo, especially upon a night train, is that not a fact?—A. Yes.

Q. Does that hold good as to the through rides out of New York?—A. Yes, sir. (Rec. 131–132.)

The appellants do not show either that the cost per unit to the carriers is less in connection with the intrastate traffic than in connection with the interstate traffic, or that the general level of the interstate rates, fares and charges is not greater than the general level of the intrastate rates, fares and charges, and it is apparent, we think, that if they should attempt to do so they would not be successful. It is a matter of common knowledge that the same trains in which passengers and their baggage are transported in interstate commerce carry also passengers and their baggage in intrastate commerce, and that the average distance over which the interstate passenger is transported is somewhat greater than the average distance over which the intrastate passenger is transported. What is here said applies equally of course to passengers traveling in ordinary passenger coaches and in sleeping and parlor cars, and similar statements

might be made concerning the transportation of milk and cream.

In its said report, the Commission, by way of illustration and for the purpose of showing the extent to which the discrimination it condemned exists, said:

> * * * The basis of 3.6 cents applies on intrastate traffic in every State bordering on the State of New York. In other words, intrastate passengers in New York enjoy a basis of fares distinctly lower than those exacted of interstate travelers in the same territory, often riding in the same trains, and also lower than the fares paid by intrastate passengers in neighboring States. The record shows beyond question that there are no transportation conditions in the State of New York that justify lower rates or fares, on the whole, than those applicable in neighboring States, or lower than the interstate rates and fares between points in New York and points in other States.

The statements contained in the latter quotation are not, and could not consistently be, denied by appellants. It is therefore apparent, we think, that the Commission's findings of undue preference and prejudice and unjust discrimination, upon which the order in question is based, are amply supported by the evidence, and that the findings fully support said order appears to us to be equally clear.

Under the circumstances disclosed by the record, however, and regardless of the matters to which we have called attention, the court will presume that

said findings are fully supported by the evidence upon which they are based. As pointed out above, the record in *Ex parte 74* is a part of the record upon which the report, findings and order of the Commission here in question were predicated, and the appellants have not placed the former record before this court for consideration.

As shown in its report in *Ex parte 74*, pages 224 to 226 inclusive, the Commission, in accordance with the requirement contained in said section 15a, separated the continental United States into four groups, designated respectively Eastern, Southern, Western, and Mountain-Pacific.

In connection with the values upon which the carriers should be permitted to earn a fair return, the Commission said:

> In the administration of section 15a of the interstate commerce act it becomes necessary for us to determine, as nearly as may be, the aggregate value of the railway property of the carriers defined in that section, held for and used in the service of transportation. In making this determination, we are authorized to utilize the results of our investigation under section 19a of the act, in so far as we deem such results available; and we are required to give due consideration to all the elements of value recognized by the law of the land for rate-making purposes, and are required to give to the property investment account of the carriers only that consideration, which, under such law, it is entitled to in establishing values for rate-making purposes.

Considerable evidence of a general character as to the various elements of value has been produced herein, which we have carefully scrutinized.

While the valuation of the railroads under section 19a of the interstate commerce act is still incomplete, the work has progressed so far that the results are of value and informative in reaching the determination we are now required to make. So far as the work has produced results, either as to particular roads, or as showing general tendencies and principles, we have given consideration thereto. As will appear from examination of our various valuation reports, and from section 19a itself, our investigations under that section are designed to give information as to the original cost of the property, the cost of reproduction new, the accrued depreciation, the amount of the investment, the corporate histories of the properties, the values of the lands, and other values and elements of value, if any.

We have also before us the investment accounts of the carriers. Since 1907 there have been mandatory regulations by us as to the manner in which the investment accounts should be kept. In the administration of section 20 of the interstate commerce act we have had frequent occasion to investigate, and in many cases to correct, errors apparent in the investment accounts; other errors have been discovered and brought to our attention in the progress of the work of valuation under section 19a.

The probable earning capacity of the properties under particular rates prescribed by law and the sums required to meet operating expenses, separately and collectively, are indicated in the record.

There is also evidence which tends to show the amount and market value of the bonds and stocks of the carriers.

In properly appraising all these elements of value we are mindful of the fact that the carriers are operating units and going concerns. This fact has been given due consideration in the light of the financial history of the transportation system of the United States, as developed by the record and as known to us. The needs for working capital, and materials and supplies on hand have been considered and allowance therefor has been made.

From a consideration of all of the facts and matters of record, and those which, under section 15a of the interstate commerce act, we are both required and authorized to consider, we find that the value of the steam-railway property of the carriers subject to the act held for and used in the service of transportation is, for the purposes of this particular case, to be taken as approximating the following:

Eastern group, as defined by the carriers	$8,800,000,000
Southern group, as defined by the carriers	2,000,000,000
Western group, as defined by the carriers, including both the Western and Mountain-Pacific groups herein designated	8,100,000,000
Total	18,900,000,000

In view of the above, we think it can not consistently be contended either that the Commission acted arbitrarily, in fact, or that it manifested a disposition to do so. However, it is said the Commission's order is not confined to specific discriminations, but applies generally instead to all rates, fares and charges of certain classes applied to intrastate transportation within the State of New York, and that, therefore, the order covers rates, fares and charges for transportation which is *purely* intrastate.

The rule to be applied in determining whether commerce is *purely* intrastate is clearly indicated by the decision of this court in *Houston, East and West Texas Railway Company* v. *United States*, 234 U. S. 342, where, in speaking of the power of Congress over interstate commerce, the language of the court was:

> * * * Its authority, extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance. As it is competent for Congress to legislate to these ends, unquestionably it may seek their attainment by requiring that the agencies of interstate commerce shall not be used in such manner as to

> cripple, retard or destroy it. The fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been confided to Federal care. Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field. * * * (Id. 351–352.)

As above shown, the Commission found that all the rates, fares and charges covered by the order under consideration were unjustly discriminatory against interstate commerce. It is therefore apparent that the order is fully supported by the findings, and since the court must assume that the latter are based upon substantial evidence in a suit of this kind, where the record upon which the findings are based is not before the court for consideration, we are unable to see how, in view of the ruling of the court above set forth, appellant's contention that the order covers commerce which is *purely* intrastate can be sustained.

II.

In making said order the Commission acted in conformity with the authority conferred and the duties imposed upon it by the interstate commerce act.

Pertinent provisions of the act have already been called to the attention of the court, and we have shown that the Commission availed itself of the authority conferred upon it by paragraph (3) of section 13 to hold joint hearings with, and to secure the cooperation, services, records, and facilities of, State authorities.

By paragraph (4) of said section 13 it is provided that where, in such proceeding, the Commission finds that rates, fares, or charges like those involved here cause "any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce," it shall prescribe the rates, fares, or charges, thereafter to be charged, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination; and further provides that the rates, fares, and charges so prescribed shall be observed while in effect by the carriers parties to such proceeding affected thereby; and that the Commission made findings and prescribed fares and charges in conformity with said provisions clearly appears in the report and order of the Commission which are under consideration here.

Therefore, extended discussion by us in this connection is unnecessary, and would, according to our view, be unjustifiable.

Appellants contend that the order is indefinite, but we think an examination of it will suffice to show that this assertion is not well founded. In the order, the classes of traffic to be affected by the intrastate fares and charges to be put in force are definitely described in unambiguous language, and the carriers who are required to comply with the terms of the order are plainly designated. Also, the territory within which the fares and charges are to be applied is pointed out with certainty.

Appellants further contend, as we understand the argument made by them in the lower court, that the disparities in fares and charges to which the attention of the court has been called do not even tend to prove that the lower intrastate fares and charges are unjustly discriminatory against the commerce to which the higher interstate fares and charges are applied. In support of this contention they set forth the fact that the words "undue burden," which were in section 415 of the transportation act at the time it was passed by the House, were stricken out by the conference committee of the House and Senate.

What was, in fact, done by the conference committee clearly appears from Conference Report No. 650, dated February 18, 1920, from which we quote as follows:

> Section 415 of the House bill provided that the Commission should have authority to make

such findings and orders as might in its judgment tend to remove any undue advantage, preference, or prejudice as between persons or localities in interstate commerce on the one hand and intrastate or foreign commerce on the other hand, or any undue burden on interstate or foreign commerce; and that such findings or orders should be observed by the carriers; the law of any State or the decision or order of any State authority to the contrary notwithstanding. The Senate amendment provided that the Commission shall make such findings and orders as will in its judgment remove any undue or unreasonable advantage, preference, or prejudice as between persons or localities in interstate or intrastate and foreign commerce, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, and shall make the rates which, in its judgment, will remove such advantage, preference, or prejudice. The Senate amendment further declared that nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the States or other local authorities in relation to taxation or the lawful police powers of the several States, including the power to make intrastate rates, except as provided otherwise in the interstate commerce act.

The conference bill in section 416 provides that whenever the Commission finds that any rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate com-

> merce, on the one hand, and interstate and foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, it shall prescribe the rate, fare, or charge or the classification, regulation, or practice in such manner as in its judgment will remove such advantage, preference, prejudice, or discrimination. The carriers are compelled to observe the orders of the Commission, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

It will be observed that when the conference committee struck out the words "undue burden" it inserted in lieu thereof the much more comprehensive words, "undue, unreasonable, or unjust discrimination," and it will be further observed that at the same time the committee eliminated entirely the qualifying words, "that nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the States or other local authorities in relation to taxation or the lawful police powers of the several States, including the power to make intrastate rates, except as provided otherwise in the interstate commerce act." Also, as the transportation act was finally passed by Congress and became a law, it both authorized and required the Commission, as paragraph (4) of section 13 of the interstate commerce act shows, to prescribe such intrastate rates, fares, charges, classifications, regulations, or practices, as the Commission might consider necessary to remove such discriminations against

interstate or foreign commerce as the Commission might find to be unjust and to be caused by intrastate rates, fares, charges, classifications, regulations, or practices, and provided further that the intrastate rates, etc., so prescribed by the Commission should be observed while in effect by the carriers, parties to the proceeding before the Commission, affected thereby, "the law of any State or the decision or order of any State authority to the contrary notwithstanding."

It thus appears that, instead of limiting the Commission to matters other than disparities between intrastate rates, fares and charges on the one hand and interstate rates, fares, and charges on the other hand, Congress manifested an intention to leave the Commission entirely free to consider and give effect to any and all evidence tending to prove the existence of the preference, prejudice, and discrimination forbidden and declared to be unlawful by paragraph (4) of section 13 of the interstate commerce act.

Appellants contend that the transporation act did not "increase the preexisting jurisdiction of the Commission as to discrimination," but we are unable to see how this contention can be sustained. As above shown the transportation act amended the interstate commerce act by forbidding and declaring to be unlawful unjust discrimination against interstate or foreign commerce, caused by intrastate rates, fares, charges, classifications, regulations, or practices, and by requiring the Commission to prescribe the rates,

etc., it might consider necessary to remove such discriminations of the kind mentioned as it might, after full hearing in the premises, find in existence.

In our opinion these amendments are significant, for the reason, among others, that Congress had previously defined, to some extent at least, the term "unjust discrimination," as the charging, demanding, collecting, or receiving, by a common carrier subject to the interstate commerce act, from any person or persons, a greater or less compensation for services rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of the act, than the carrier charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions. (Sec. 2, I. C. Act.)

Appellants also contend that the order of the Commission is invalid because said section 15a does not require the Commission to base, and because the Commission has not based, its order concerning the intrastate fares and charges upon a division of the value of the railway property; that is, upon a separate value of the property used by the carriers for common carrier purposes which may be regarded as used exclusively in intrastate commerce. In making this contention, however, we think appellants overlook the fact that where the interstate and intrastate transactions of carriers are "so related that the

Government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule," and further overlook the fact that the dominant rule prescribed by Congress in said section 15a requires the Commission to initiate, modify, establish or adjust rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the *aggregate* value of the railway property of such carriers held for and used in the service of transportation.

In the *Shreveport case* above mentioned this court, after referring to the cases of *Baltimore & Ohio Railroad Co.* v. *Interstate Commerce Commission*, 221 U. S. 612, 618; *Southern Railway Co.* v. *United States*, 222 U. S. 20, 26, 27; *Second Employers' Liability cases*, 223 U. S. 1, 48, 51; *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194, 205, 213; *Minnesota Rate cases*, 230 U. S. 352, 431; *Illinois Central Railroad Co.* v. *Behrens*, 233 U. S. 473, used the following pertinent language:

> In *Baltimore & Ohio Railroad Co.* v. *Interstate Commerce Commission*, *supra*, the argument against the validity of the hours of service act (March 4, 1907, c. 2939, 34 Stat. 1415) involved the consideration that the interstate and intrastate transactions of the carriers were so interwoven that it was utterly impracticable for them to divide their employees so that

those who were engaged in interstate commerce should be confined to that commerce exclusively. Employees dealing with the movement of trains were employed in both sorts of commerce; but the court held that this fact did not preclude the exercise of Federal power. As Congress could limit the hours of labor of those engaged in interstate transportation, it necessarily followed that its will could not be frustrated by prolonging the period of service through other requirements of the carriers or by the commingling of duties relating to interstate and intrastate operations. Again, in *Southern Railway Co.* v. *United States*, *supra*, the question was presented whether the amendment to the safety appliance act (March 2, 1903, c. 976, 32 Stat. 943) was within the power of Congress in view of the fact that the statute was not confined to vehicles that were used in interstate traffic but also embraced those used in intrastate traffic. The court answered affirmatively, because there was such a close relation between the two classes of traffic moving over the same railroad as to make it certain that the safety of the interstate traffic, and of those employed in its movement, would be promoted in a real and substantial sense by applying the requirements of the act to both classes of vehicles. So, in the *Second Employers' Liability cases*, *supra*, it was insisted that while Congress had the authority to regulate the liability of a carrier for injuries sustained by one employee through the negligence of another, where all were engaged in interstate commerce, that

power did not embrace instances where the negligent employee was engaged in intrastate commerce. The court said that this was a mistaken theory, as the causal negligence when operating injuriously upon an employee engaged in interstate commerce had the same effect with respect to that commerce as if the negligent employee were also engaged therein. The decision in *Employers' Liability cases*, 207 U. S. 463, is not opposed, for the statute there in question (June 11, 1906, c. 3073, 34 Stat. 232) sought to regulate the liability of interstate carriers for injuries to any employee even though his employment had no connection whatever with interstate commerce. (See *Illinois Central R. R. Co.* v. *Behrens, supra.*)

While these decisions sustaining the Federal power relate to measures adopted in the interest of the safety of persons and property, they illustrate the principle that Congress in the exercise of its paramount power may prevent the common instrumentalities of interstate and intrastate commercial intercourse from being used in their intrastate operations to the injury of interstate commerce. This is not to say that Congress possesses the authority to regulate the internal commerce of a State, as such, but that it does possess the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions of interstate carriers may thereby be controlled.

This principle is applicable here. We find no reason to doubt that Congress is entitled to

keep the highways of interstate communication open to interstate traffic upon fair and equal terms. That an unjust discrimination in the rates of a common carrier, by which one person or locality is unduly favored as against another under substantially similar conditions of traffic, constitutes an evil is undeniable; and where this evil consists in the action of an interstate carrier in unreasonably discriminating against interstate traffic over its line, the authority of Congress to prevent it is equally clear. It is immaterial, so far as the protecting power of Congress is concerned, that the discrimination arises from intrastate rates as compared with interstate rates. The use of the instrument of interstate commerce in a discriminatory manner so as to inflict injury upon that commerce, or some part thereof, furnishes abundant ground for Federal intervention. Nor can the attempted exercise of State authority alter the matter, where Congress has acted, for a State may not authorize the carrier to do that which Congress is entitled to forbid and has forbidden. (Id. 352–354.)

* * * * *

It is also clear that, in removing the injurious discriminations against interstate traffic arising from the relation of intrastate to interstate rates, Congress is not bound to reduce the latter below what it may deem to be a proper standard fair to the carrier and to the public. Otherwise, it could prevent the injury to interstate commerce only by the sacrifice of its judgment as to interstate rates.

> Congress is entitled to maintain its own standard as to these rates and to forbid any discriminatory action by interstate carriers which will obstruct the freedom of movement of interstate traffic over their lines in accordance with the terms it establishes.
>
> Having this power, Congress could provide for its execution through the aid of a subordinate body; and we conclude that the order of the Commission now in question can not be held invalid upon the ground that it exceeded the authority which Congress could lawfully confer. (Id. 355.)

III.

The provisions of law involved are not in conflict with the Constitution of the United States.

We have shown that in making and issuing the order involved in this suit the Commission did not exceed the authority conferred upon it by the interstate commerce act as amended by the transportation act, 1920, and in doing so we called attention to the provisions of law under which the Commission operated. We think an examination of these provisions will be entirely sufficient to demonstrate that in making them Congress did not manifest any intention to interfere, or to authorize the Commission to interfere, with rates, fares, or charges for the transportation of passengers or property in commerce which is *purely* intrastate. The appellants contend that Congress did so interfere, and we understand this to be, in substance, the only claim advanced by them

in support of their contention that the action of Congress referred to is unconstitutional.

In *Gibbons* v. *Ogden*, 9 Wheaton 1, pertinent language of this court was:

> * * * If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States. (Id. 196.)

In *Houston, East and West Texas Railway Company* v. *United States*, 234 U. S. 342, commonly called the *Shreveport case*, it was contended "that Congress is impotent to control the intrastate charges of an interstate carrier even to the extent necessary to prevent injurious discrimination against interstate traffic"; and in holding the contention to be unsound this court, among other things, said:

> It is unnecessary to repeat what has frequently been said by this court with respect to the complete and paramount character of the power confided to Congress to regulate commerce within the several States. It is of the essence of this power that, where it exists, it dominates. Interstate trade was not left to be destroyed or impeded by the rivalries of local governments. The purpose was to make impossible the recurrence of the evils which had overwhelmed the Confederation and

to provide the necessary basis of national unity by insuring "uniformity of regulation against conflicting and discriminating State legislation." By virtue of the comprehensive terms of the grant, the authority of Congress is at all times adequate to meet the varying exigencies that arise and to protect the national interest by securing the freedom of interstate commercial intercourse from local control. *Gibbons* v. *Ogden*, 9 Wheat. 1, 196, 224; *Brown* v. *Maryland*, 12 Wheat. 419, 446; *County of Mobile* v. *Kimball*, 102 U. S. 691, 696, 697; *Smith* v. *Alabama*, 124 U. S. 45, [465] 473; *Second Employers' Liability cases*, 223 U. S. 1, 47, 53, 54; *Minnesota Rate cases*, 230 U. S. 352, 398, 399.

Congress is empowered to regulate—that is, to provide the law for the government of interstate commerce; to enact "all appropriate legislation" for its "protection and advancement" (*The Daniel Ball*, 10 Wall. 557, 564); to adopt measures "to promote its growth and insure its safety" (*County of Mobile* v. *Kimball*, supra); "to foster, protect, control, and restrain" (*Second Employers' Liability cases, supra*). Its authority, extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be

> conducted upon fair terms and without molestation or hindrance. As it is competent for Congress to legislate to these ends, unquestionably it may seek their attainment by requiring that the agencies of interstate commerce shall not be used in such manner as to cripple, retard or destroy it. The fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been confided to Federal care. Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field. (Id. 350–352.)

We thus see that the power of Congress over interstate and foreign commerce is full and complete; that where it exists it dominates; that it was vested in Congress to secure uniformity of regulation against conflicting and discriminating State legislation and to protect the national interest by securing the freedom of interstate commercial intercourse from local control; that such power enables Congress

to enact all appropriate legislation for the protection and development of interstate and foreign commerce; that this power necessarily embraces the right to control the operations of interstate carriers in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance, and that, wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule.

That the constitutional power of Congress over interstate and foreign commerce, as that power is defined in the above-mentioned decisions, and in a large number of other decisions, of this court, which might be referred to, was not exceeded in enacting the provisions of law here involved is so clearly apparent, when the definitions are compared with the powers exercised, that, in our opinion, further argument in this connection is unnecessary.

In paragraph (4) of section 13 of the interstate commerce act, above quoted, it will be seen that all Congress did was to authorize the InterstateCommerce Commission to make orders which would remove and prevent any undue or unreasonable advantage, pref-

erence, or prejudice as between person or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, and any undue, unreasonable, or unjust discrimination against interstate or foreign commerce; and that by paragraphs (2) and (3) of section 15a Congress simply authorized and required the Commission to initiate, modify, establish and adjust rates so that carriers as a whole, or as a whole in each rate group or territory which the Commission may from time to time designate, may earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation.

It is true, that by said paragraph (3) Congress fixed for two years beginning March 1, 1920, the annual net railway operating income at 5½ per centum of said aggregate value, except that it authorized the Commission, in its discretion, to increase said percentage to 6. In this connection, however, we do not apprehend that an effort will be made by the appellants to show that this action of Congress is in excess of its constitutional power.

At the time matters covered by the transportation act were being discussed, Congress was confronted with the necessity of preserving and strengthening the interstate common carriers of the country, and making them efficient and serviceable agencies for the transportation of interstate and foreign com-

merce, and also for the transportation of intrastate commerce. Under these circumstances we think it is obvious that the most important matter presented for consideration was the means by which the necessary railway operating revenues might be secured. After several months of discussion, deliberation and reflection, Congress perfected and put into operation the plan now under consideration, and our understanding of a large number of decisions heretofore rendered by this court convinces us that, in taking this action, Congress did not exceed its power under the Constitution of the United States. In *McCulloch* v. *Maryland*, 4 Wheat. 316, pertinent language of the court was as follows:

> * * * Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional. (Id. 420.)

For the reasons above set forth we insist that the appeal in this suit should be dismissed.

Respectfully submitted.

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